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No. _____

In The
Supreme Court of the United States

JARROD WILLIAM MESSER,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari
to the Twelfth District Court of Appeals of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Under what circumstances is an excessive preindictment delay a violation of the Fifth Amendment right to due process in the context of criminal enterprise statutes with extended applicable statutes of limitations?

II. When state law provides protection of the right to a speedy trial distinct from that protected by the federal constitution, under what circumstances is a state's denial of that right to a criminal defendant a violation of the Fifth and Fourteenth Amendment right to due process and equal protection?

III. In the context of criminal enterprise statues with protracted applicable statutes of limitations, which offer little protection against stale criminal indictments, should the Sixth Amendment right of criminal defendants to a speedy trial?

IV. Is there a split among the Circuit Courts over the applicable test for determining whether an extended preindictment delay is a violation of the Fifth Amendment right to due process?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are Jarrod William Messer, Petitioner, and the State of Ohio, Respondent.

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INTRODUCTORY PRAYER

The Petitioner respectfully requests that this Court grant a writ of certiorari to review the decision and opinion of the Ohio Twelfth District Court of Appeals entered in this proceeding on November 5, 2007, from which the Ohio Supreme Court denied Petitioner leave to appeal in its entry of April 9, 2008.

OPINIONS BELOW

The Decision and Entry of the Court of Common Pleas of Clermont County, Ohio (App. 30a-59a), is unpublished and unreported. The opinion of the Twelfth District Court of Appeals of Ohio (No. CA2006-10-084) (App. 1a-14a), is unpublished but unofficially reported at 2007 WL 3243535, 2007-Ohio-5899 (2007). The decision of the Ohio Supreme Court denying Petitioner leave to appeal (App. 60a) is published at 117 Ohio St.3d 1458, 884 N.E.2d 67 (Table), 2008-Ohio-1635 (2008).

JURISDICTION

The Ohio Supreme Court entered its decision to deny Petitioner leave to appeal on April 9, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Sections 2901.13(A)(1)(a) and 2901.13(D) of the Ohio Revised Code, which provide:

> (A)(1) Except as provided in division (A)(2) or (3) of this section or as otherwise provided in this

> section, a prosecution shall be barred unless it is commenced within the following periods after an offense is committed:
>
> (a) For a felony, six years;
>
> * * *
>
> (D) An offense is committed when every element of the offense occurs. In the case of an offense of which an element is a continuing course of conduct, the period of limitation does not begin to run until such course of conduct or the accused's accountability for it terminates, whichever occurs first.

The Ohio Racketeer Influenced and Corrupt Organizations Act ("RICO"), O.R.C. § 2923.31(C), which provides that:

> (C) "Enterprise" includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. "Enterprise" includes illicit as well as licit enterprises.

The Ohio RICO Act, O.R.C. § 2923.31(E), which provides that:

> (E) "Pattern of corrupt activity" means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are

> related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event.
>
> At least one of the incidents forming the pattern shall occur on or after January 1, 1986. Unless any incident was an aggravated murder or murder, the last of the incidents forming the pattern shall occur within six years after the commission of any prior incident forming the pattern, excluding any period of imprisonment served by any person engaging in the corrupt activity . . . .

The Ohio RICO Act, O.R.C. § 2923.32(A)(1), which provides that:

> (A)(1) No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.

Section 2945.71(C)-(E) of the Ohio Revised Code, which provides that:

> (C) A person against whom a charge of felony is pending:
>
> (1) Notwithstanding any provisions to the contrary in Criminal Rule 5(B), shall be accorded a preliminary hearing within fifteen consecutive days after the person's arrest if the accused is not held in jail in lieu of bail on the

pending charge or within ten consecutive days after the person's arrest if the accused is held in jail in lieu of bail on the pending charge;

(2) Shall be brought to trial within two hundred seventy days after the person's arrest.

(D) A person against whom one or more charges of different degrees, whether felonies, misdemeanors, or combinations of felonies and misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial on all of the charges within the time period required for the highest degree of offense charged, as determined under divisions (A), (B), and (C) of this section.

(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section.

STATEMENT OF THE CASE

I. BACKGROUND

This case, which arises from Respondent's indictment and conviction of Petitioner under the Ohio Racketeer Influenced and Corrupt Organizations Act ("RICO"), O.R.C. § 2923.32(A)(1), concerns the fundamental rights to due process and a speedy trial under the Fifth, Sixth, and Fourteenth Amendments

to the United States Constitution. (App. 63a). A Clermont County, Ohio, grand jury indicted Mr. Messer under the Ohio RICO statute on September 22, 2004, for one count of engaging in a pattern of corrupt activity, a first degree felony.[1] (App. 2a). The indictment was based upon four predicate offenses, the conviction for the first of which was entered February 21, 2003, and the conviction for the last of which was entered on November 7, 2003. (App. 71a).[2] Following the last predicate conviction, on November 7, 2003, Respondent delayed for 320 days, until September 22, 2004, to obtain the RICO indictment. As of the date of the RICO indictment, Mr. Messer had already been incarcerated in an Ohio correctional facility for nearly two years, as the result of concurrent sentences for convictions for the predicate offenses upon which Respondent based the RICO indictment.

The warrant for the RICO charge was entered into the National Crime Information Center databank sometime between September 22, 2004, and September 30, 2004. (App. 2a, 37a). In November, 2004, Mr. Messer's counsel reminded Clermont County officials that Mr. Messer was already incarcerated, and had been since 2003, for prior convictions. (App. 2a,

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[1] Ohio does not employ a circuit court system. Instead, each county may pursue felony charges committed within its jurisdiction in the name of the State of Ohio.

[2] Although the RICO indictment of September 22, 2004, lists seven predicate offenses as the basis for the charge of engaging in a pattern of corrupt activity, Respondent later stipulated that the RICO indictment only comprised four predicate offenses. (App. 64a-66a, 71a).

76a). Nevertheless, Respondent failed to arrest Mr. Messer until December 15, 2004, a delay of 84 days.[3] (App. 2a, 37a).

On December 16, 2004, the day after his arrest pursuant to the RICO indictment, Mr. Messer appeared pro se at his arraignment. (App. 10a). He requested a continuance until December 23, 2004, and later to December 30, 2004, so that his counsel could be present. (App. 10a, 49a-50a). Mr. Messer was arraigned on December 30, 2004, and the pretrial hearing was scheduled for January 7, 2005. By the time Mr. Messer was arraigned on the RICO charge, he had served all or substantially of his concurrent sentences for the predicate acts. (*See* App. 10a, 49a-50a, 76a). At the hearing on January 7, 2005, Mr. Messer requested a continuance until February 18, 2005. (App. 10a, 51a). Following a series of continuances until May 26, 2005, Mr. Messer filed a blanket waiver of his right to a speedy trial. (App. 10a, 51a-54a). In the period from May 26, 2005, until July 28, 2006, Mr. Messer requested additional continuances and filed requests for discovery and a bill of particulars. (App. 11a, 56a).

On July 28, 2006, Mr. Messer moved to dismiss the RICO indictment based upon, in pertinent part, Respondent's failure to provide him with a speedy trial and upon the argument that statutory time limits for holding trial had lapsed prior to Mr. Messer's

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[3] Indeed, the sentence which Mr. Messer was serving at the time of the RICO indictment resulted from a conviction in the very same Clermont County Court of Common Pleas. (*See* App. 31a).

purported waiver of his speedy trial rights. (App. 11a, 55a-56a). The Clermont County Court of Common Pleas denied Mr. Messer's motion on August 11, 2006, whereupon Mr. Messer entered a plea of no contest to the charge of attempted engaging in a pattern of corrupt activity, a third degree felony. (App. 3a). The court found Mr. Messer guilty of this offense on August 15, 2006, and, on September 28, 2006, sentenced Mr. Messer to five years of community control under the supervision of the Adult Probation Department. (App. 3a).

Mr. Messer then appealed the trial court's denial of his motion to dismiss to the Ohio Twelfth District Court of Appeals. (App. 3a). The Twelfth District Court affirmed the trial court's denial of the motion, finding Respondent had been reasonably diligent although it had taken 84 days to locate Mr. Messer in its own prison system, and finding that Mr. Messer was responsible for the lapse of time between his arraignment and the entry of his plea of no contest. (App. 4a-5a).

Mr. Messer then sought review from the Ohio Supreme Court, filing his Memorandum in Support of Jurisdiction on December 20, 2007. Without analysis, the Ohio Supreme Court denied Mr. Messer leave to appeal in its entry filed April 9, 2008. (App. 60a).

II. DECISION AND ENTRY OF THE COURT OF COMMON PLEAS OF CLERMONT COUNTY, OHIO

The Clermont County Court of Common Pleas denied Mr. Messer's motion to dismiss the RICO

indictment based upon the denial of his rights to a speedy trial under the Sixth Amendment the United States Constitution, under Article I, § 10 of the Ohio Constitution, and under § O.R.C. 2945.71(C). (App. 35a, 44a, 58a). It held that the 84-day delay between the issuance of the indictment and Mr. Messer's arrest thereon was not prejudicial. (App. 38a). Further, the court held that the Sixth Amendment applied only to the period beginning with Mr. Messer's indictment. (App. 38a-39a). The court accordingly disregarded the entire delay of 320 days which lapsed before the RICO indictment itself and after Mr. Messer's conviction for the last of the predicate offenses upon which the RICO indictment was based. (App. 39a). This is inconsistent with prior application of O.R.C.§ 2945.71(C) in other cases. See e.g. *State v. Adams*, 43 Ohio St. 3d 67, 538 N.E.2d 1025 (1989); *State v. Homan*, 89 Ohio St.3d 421, 732 N.E.2d 952, 2000-Ohio-212 (2000).

The court also considered the delay of 604 days between Mr. Messer's indictment and the entry of his plea of no contest. Considering this period, the court first concluded that it should give little weight to the delay because Mr. Messer was, for part of the time, incarcerated on other charges. (App. 40a). It then found that Mr. Messer was largely responsible for much of the delay. (App. 41a). Concluding that Respondent had not violated Mr. Messer's right to a speedy trial, the court noted that Mr. Messer had not submitted his motion to dismiss until July 28, 2006, and held that Mr. Messer had not been prejudiced by any of the delays in his indictment, arrest, and prosecution. (App. 41a-42a). Finally, the court held that Mr. Messer's Ohio statutory right to be tried within 270 days of his arrest had not been violated

because the trial clock had been tolled as the result of Mr. Messer's requests for continuances and by the waiver of his right to be tried; furthermore, the court found that prior interpretations of this statute (O.R.C. § 2945.71) meant that the 270-day limit did not apply to RICO indictments. (App. 49a-58a).

III. OPINION OF THE OHIO TWELFTH DISTRICT COURT OF APPEALS

The Twelfth District echoed the trial court's determination that the delay of 84 days between issuance of the RICO indictment and Mr. Messer's arrest thereon was reasonable and not presumptively prejudicial. (App. 4a-5a). The court held that the delay of 604 days between Mr. Messer's arraignment and his entry of a plea of no contest was occasioned by Mr. Messer himself, tolling the time in which Respondent was obligated to bring Mr. Messer to trial, and it held further that he had effectively waived his right to a speedy trial. (App. 4a-5a, 10a-11a). Therefore, the court found that Mr. Messer's Sixth Amendment rights had not been violated. (App. 12a).

Additionally, the Twelfth District reviewed Mr. Messer's claim with regard to his Ohio statutory right to be tried within 270 days of his arrest. Like the trial court, the appellate court determined that the waiver of the right to be tried and Mr. Messer's requests for continuances tolled the statutory trial clock.[4] (App. 6a-

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[4] This, in effect, meant that the waiver applied retroactively and amounted to a waiver of Mr. Messer's speedy trial rights not only after the execution of the waiver, but to his speedy trial rights in the period before the waiver was executed.

10a). The court disregarded any connection between the predicate offenses and the RICO indictment and held that because the timeline for trial on the predicate offenses was entirely distinct from the timeline for trial on the RICO indictment, that Mr. Messer's Ohio statutory right to be tried within 270 days had not been violated. (App. 10a, 12a).

IV. ENTRY OF THE OHIO SUPREME COURT

On December 20, 2007, Mr. Messer filed a memorandum with the Ohio Supreme Court, seeking review of the decision of the Twelfth District Court of appeals. The Ohio Supreme court summarily denied Mr. Messer leave to appeal in an entry dated April 9, 2008. (App. 60a).

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that there are four reasons why this Court should grant his petition for certiorari and review the decisions of the Ohio courts below. First, excessive preindictment delays are particularly problematic in the context of prosecutions for criminal enterprises. The Ohio RICO statute allows prosecution for as few as two offenses, the second of which may be committed as long as six years after the first. O.R.C. § 2923.31(E). The statute of limitations for a RICO indictment is itself six years, meaning that as many as twelve years could elapse between commission of the first predicate offense and a subsequent RICO indictment. O.R.C. § 2901.13(A)(1)(a). Such lengthy delays between predicate acts and a resulting indictment pose a

significant threat to the due process rights of criminal defendants.

Second, under Ohio law, the time during which Respondent was required to bring Mr. Messer to trial on the RICO indictment should have been calculated from the date of his final predicate conviction, rather than from the date on which the RICO indictment itself issued. *See e.g. State v. Adams*, 43 Ohio St. 3d 67, 538 N.E.2d 1025 (1989); *State v. Homan*, 89 Ohio St.3d 421, 732 N.E.2d 952, 2000-Ohio-212 (2000); O.R.C. § 2901.13(D). Even if this protection of Mr. Messer's right to a speedy trial is more strict than federal guarantees established by the Sixth Amendment, Respondent's denial of such protection to Mr. Messer is a violation of Mr. Messer's federal due process rights under the Fifth and Fourteenth Amendments. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 144 (1968); *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056 (1969).

Third, excessive preindictment delays pose a particular problem under this Court's application of the Sixth Amendment right to a speedy trial. The Court has stated that Sixth Amendment guarantees are not implicated until the initiation of the adversary process by indictment or arrest, noting that the primary protection against abusive or prejudicial preindictment delays is the applicable statute of limitations. *See e.g. U.S. v. MacDonald*, 456 U.S. 1, 6-8, 102 S.Ct. 1497 (1982); *U.S. v. Marion*, 404 U.S. 307, 313, 322, 92 S.Ct. 455 (1971). Although statutes of limitations might protect against abusive preindictment delays with respect to single criminal acts, this rationale breaks down in the context of prosecutions for criminal enterprises. Because a

statute such as the Ohio RICO law allows for prosecution for as few as two criminal acts which may be committed as long as six years apart, and because the statute of limitations for a RICO prosecution allows an additional six years following the second predicate act, a delay of as long as twelve years can follow before an indictment issues. In fact, because the limitations period does not begin to run until "[the criminal] course of conduct or the accused's accountability for it terminates, whichever occurs first," a series of individual criminal acts, each committed several years apart, could lead to an indefinitely protracted limitations period. O.R.C. § 2901.13(D).

Finally, the Circuit Courts are in conflict over the applicable standard by which to review a due process claim based upon lengthy preindictment delay. The First, Second Third, Tenth, and Eleventh Circuits have required a showing of improper prosecutorial motive in order for such a claim to be cognizable. *Hoo v. U.S.*, 484 U.S. 1035, 1035-36, 108 S.Ct. 742 (1988); *U.S. v. Lebron-Gonzalez*, 816 F.2d 823 (1st Cir. 1987); *U.S. v. Lovasco*, 825 F.2d 667 (1987); *U.S. v. Ismaili*, 828 F.2d 153 (3d. Cir. 1987); *U.S. v. Jenkins*, 701 F.3d 850 (10th Cir. 1983); *U.S. v. Caporale*, 806 F.3d 1487 (11th Cir. 1986). The Fourth and Ninth Circuits, however, have applied a test which balances possible prejudice to a defendant against the government's justification for delay. *U.S. v. Automated Medical Labs., Inc.*, 770 F.2d 399 (4th Cir. 1985); *U.S. v. Valentine*, 783 F.2d 1413 (9th Cir. 1986). Moreover, the Fifth and Seventh Circuits have acknowledged conflicts among decisions even in their own circuits. *See Dickerson v. Louisiana*,

816 F.3d 220 (5th Cir. 1987); *U.S. v. Hollins*, 811 F.2d 384 (7th Cir. 1987).

I. EXCESSIVE PREINDICTMENT DELAY IN THE CONTEXT OF THE OHIO RICO STATUTE VIOLATES THE FIFTH AMENDMENT RIGHT TO DUE PROCESS

This Court has held that the interest in prevention of "prejudice to the defense caused by the passage of time . . . is protected primarily by the Due Process Clause and by statutes of limitations." *MacDonald*, 456 U.S. at 8. According to the Court, "the Due Process Clause of the Fifth Amendment would require dismissal of [an] indictment" if a defendant were to show that "the pre-indictment delay [had] caused substantial prejudice to [the defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *Marion*, 404 U.S. at 324. To establish that a lengthy, preindictment delay is a violation of a defendant's Fifth Amendment right to due process, the defendant must prove: (1) that "the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him," and; (2) that "it caused [the defendant] actual prejudice in bringing his defense." *U.S. v. Gouveia*, 467 U.S. 180, 192, 104 S.Ct. 2292 (1984).

In the context of Ohio's RICO statute, preindictment delay poses a particular threat to the due process rights of the accused. First, the Ohio RICO law allows prosecution for as few as two predicate offenses, the second of which can occur as long as six years after the initial offense. O.R.C. § 2923.31(E).

Second, the applicable statute of limitations allows the state six years from commission of the last predicate offense to bring a RICO indictment. O.R.C. § 2901.13(A)(1)(a). Therefore, Respondent could bring a RICO indictment against a defendant for two predicate offenses, the first of which was committed 12 years prior. In *Marion*, Justice Douglas wrote a concurring opinion in which he made the following remarks regarding the danger to the rights of defendants in light of extended, preindictment delays:

> The impairment of the ability to defend oneself may become acute because of delays in the pre-indictment stage. Those delays may result in the loss of alibi witnesses, the destruction of material evidence, and the blurring of memories. At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his.

404 U.S. at 331.[5]

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[5] In *Marion*, Justice Douglas concurred in the result. *Id.* at 326. Justices Brennan and Marshall joined in Justice Douglas's concurring opinion, which was based on Justice Douglas's belief that the Sixth Amendment right to a speedy trial should, at least in some circumstances, attach prior to the issuance of an indictment. *Id.*

The Ohio statute of limitations also specifies that "in the case of an offense of which an element is a continuing course of conduct, the period of limitation does not begin to run until such course of conduct or the accused's accountability for it terminates, whichever occurs first." O.R.C. § 2901.13(D). The application of this section of the statute of limitations to the Ohio RICO law creates a potentially unlimited period in which Respondent could indict a defendant for a RICO violation based upon predicate offenses the earliest of which could have been committed far longer than 12 years prior to the indictment.

In the instant case, Respondent's delay in bringing the RICO indictment against Mr. Messer prejudiced his defense. Furthermore, Respondent appears to have had improper motivations for delaying the RICO indictment. Finally, given the potential for abuse of defendants' due process rights in light of Ohio's statue of limitations as it applies to the Ohio RICO law, this case presents the Court with an excellent opportunity to resolve an important question of federal constitutional due process guarantees.

A. PREJUDICE

Mr. Messer's Fifth Amendment right to due process required dismissal of the RICO indictment against him based upon actual prejudice to his defense, resulting from Respondent's delay in bringing the indictment. *Marion*, 404 U.S. at 324; *Gouveia*, 467 U.S. at 192. In *U.S. v. Lovasco*, the Court held that dismissal of indictment as violative of a defendant's right to due process requires, first, a showing of actual prejudice and, second, a showing that the prosecution delayed

for improper reasons. *See* 431 U.S. 783, 789-90, 97 S.Ct. 2044 (1977); *U.S. v. Norris*, 501 F. Supp.2d 1092 (S.D. Ohio 2007); *see also U.S. v. Sanders*, 452 F.3d 572, 577 (6th Cir. 2006) (reh'g en banc denied Oct. 27, 2006) (stating that the right to due process means "not only that the required process will be afforded, but that it will be afforded without 'oppressive delay'" (quoting *Lovasco*, 431 U.S. at 789)). Mr. Messer's defense suffered actual prejudice as the result of Respondent's delay in bringing the RICO indictment against him.

During the period of 17 months for which Respondent delayed in bringing its RICO indictment against Mr. Messer, transcripts of certain plea agreements, into which Mr. Messer entered for predicate offenses, were destroyed.[6] Had these transcripts been available to him, Mr. Messer could have established that he had never been warned of the RICO liability which resulted from his pleas of no contest. More importantly, Mr. Messer was prejudiced by the loss of his ability to challenge the merits of the predicate charges against him or test the prosecution's case through his right to trial. Induced by promises of concurrent sentences, once he had pled to the predicate offenses, Mr. Messer unknowingly gave the prosecution all of the elements of a RICO charge. This potential effect was never explained to Mr. Messer. With Mr. Messer's pleas to the predicate offenses on record, as well as the resulting convictions,

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[6] As indicated, Respondent based the RICO indictment on four predicate offenses. (App. 76a). Pursuant to plea agreements in the earlier cases, Mr. Messer entered pleas of no contest.

Respondent would have had a substantial advantage at trial on the RICO charge, to the prejudice of Mr. Messer. Any challenge to the pleas for the predicate acts had been rendered essentially moot at that point because he had served nearly all of the sentences for those acts.

For example, violation of the Ohio RICO law requires "employ[ment] by" or "associat[ion] with" "any enterprise." O.R.C. § 2923.32(A)(1). The term "enterprise" is defined as "any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity." O.R.C. § 2923.31(C). Ohio courts have held that the enterprise requirement means more than "merely committing successive or related crimes." *State v. Schlosser*, 79 Ohio St.3d 329, 333, 681 N.E.2d 911, 1998-Ohio-716 (1997); *see also e.g. State v. Baker*, Not Reported in N.E.2d, 2004 WL 877688 (Ohio App. 3 Dist. 2004); *State v. Coleman*, Not Reported in N.E.2d, 2003 WL 22429686 (Ohio App. 2 Dist. 2003); *State v. Hicks*, Not Reported in N.E.2d., 2003 WL 23095414 (Ohio App. 12 Dist. 2003). Having encouraged Mr. Messer to plead to a series of "successive or related crimes," Respondent had essentially established all but the "enterprise" element of a RICO violation. Confronted, 17 months after the last of the predicate convictions upon which Respondent based its RICO indictment, Mr. Messer would have had a great deal of difficulty mounting an

adequate defense at trial for the very reasons noted by Justice Douglas in *Marion*.[7]

More importantly, an Ohio RICO conviction does not require that a defendant be convicted of the underlying offenses. Rather, the prosecution simply need prove, by a preponderance of evidence, that the defendant committed the necessary predicate acts. *See State v. Burge*, 82 Ohio App.3d 244, 254-55, 611 N.E.2d 866 (Ohio App. 12 Dist. 1992) (analyzing the requirement of proof of predicate acts with respect to property forfeiture provision of Ohio RICO law). In the context of a law criminalizing a continuing course of conduct, such as the Ohio RICO law, preindictment delays are particularly problematic for defendants. This poses a special problem in light of the six-year statute of limitations applicable to Ohio RICO, which itself allows six years between the first and last of the required predicate acts. O.R.C. § 2901.13(A)(1)(a); O.R.C. § 2923.31(E). The longer the delay, the more difficult it becomes for a defendant to challenge evidence of the defendant's commission of the predicate offenses. Further, it becomes progressively more difficult for a defendant to prove that his defense has been prejudiced by the delay.

Because Respondent's delay in bringing indictment against Mr. Messer caused actual prejudice to his

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[7] The cases discussing deprivation of the right to due process resulting from preindictment delays almost all involve cases that actually went to trial. In the instant case, confronted with a stale indictment and nearly overwhelmed by the case Respondent had compiled surreptitiously against him, Mr. Messer entered a plea of no contest.

defense, this Court should find that Respondent violated Mr. Messer's due process rights.[8] Furthermore, this case offers the Court a significant opportunity to consider the question of whether and when being compelled to accept a plea agreement is itself prejudice for purposes of due process analysis. The due process inquiry, however, must also include an analysis of Respondent's reasons for the delay. *Lovasco*, 431 U.S. at 790. Mr. Messer will demonstrate that Respondent acted on improper motivations for bringing the indictment some 17 months after it had had all the necessary facts in its possession.

B. IMPROPER MOTIVE

The second requirement of a defendant seeking dismissal of an indictment based upon excessive preindictment delay is a showing that the government delayed for improper or bad faith reasons. *See Marion*, 404 U.S. at 324; *Gouveia*, 467 U.S. at 192; *Norris*, 501 F. Supp.2d. at 1099. In *Lovasco*, the Court noted that the *Marion* case "makes clear that proof of prejudice is

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[8] The Ninth Circuit Court of Appeals takes the position that the consideration of whether a preindictment delay amounts to a violation of due process rights requires the application of a balancing test. *See e.g. U.S. v. Ross*, 123 F.2d 1181, 1184-85 (9th Cir. 1997); *U.S. v. Moran*, 759 F.2d 777 (9th Cir. 1985). In *Ross*, the Ninth Circuit stated that "[w]hether due process has been violated is decided under a balancing test and '[i]f mere negligent conduct by the prosecutors is asserted, then obviously the delay and/or prejudice suffered by the defendant will have to be greater.'" 123 F.2d at 1184-85 (quoting *Moran*, 759 F.2d at 782). The inverse, therefore, would appear to be true: that as the government's motive is shown to be more improper, the defense would be required to show less prejudice.

generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the [preindictment] delay as well as the prejudice to the accused." *Lovasco*, 431 U.S. at 790 (emphasis added). The "Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the delay was an intentional device to gain tactical advantage over the accused," or if the government "intentionally delayed . . . to harass [the defendant]." *Marion*, 404 U.S at 324-25. In *Sabath*, the U.S. District Court for the Northern District of Illinois found that coupled with the defendant's showing of prejudice, the government's "recklessness and lack of investigatory justification for [its] delay" amounted to a violation of the defendant's due process rights. 990 F. Supp. 1007, 1017 (N.D. Ill. 1998).

In *Lovasco*, the Court distinguished between two types of delay: "investigative" and delay undertaken solely to gain tactical advantage. 431 U.S. at 796. An "investigative delay" results from the requirement that prosecutors defer seeking an indictment until having probable cause to believe an accused is guilty or from a prosecutorial decision to wait until the securing of sufficient evidence to be able to establish the guilt of an accused beyond a reasonable doubt. *See id.* at 790-91. Investigative delays are permissible, but delays undertaken solely for tactical advantage are not. *See id.* at 796; *Marion*, 404 U.S. at 324.

In the instant case, Respondent had in its possession all of the facts upon which it based the RICO indictment for the entire seventeen months

during which it delayed.[9] Further investigation was not necessary, nor did Respondent, in fact, conduct any further investigation. A "prosecutor abides by [standards of fair play and decency] if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt." *Lovasco*, 431 U.S. at 795. Given that the State had all of the evidence it needed, it had no cause based upon standards of fair play and decency to delay for seventeen months. Although the *Lovasco* case established that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time," the delay in this case was not investigative. *Id.* at 796.[10]

Seventeen months after Mr. Messer's entry of a plea of no contest to the last of the predicate offenses on which Respondent's RICO indictment was based,

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[9] Mr. Messer's plea of no contest to the last of the predicate offenses upon which the RICO indictment was based was entered on November 7, 2003. The RICO indictment is dated September 22, 2004. (App. 2a).

[10] The Court in *Lovasco* remarked that "compelling a prosecutor to file public charges as soon as the requisite proof has been developed against one participant on one charge would cause numerous problems in those cases in which a criminal transaction involves more than one person or more than one illegal act." *Lovasco*, 431 U.S. at 792-93. Here, the State made no allegation that Mr. Messer was involved in additional criminal activities, nor was there a concern regarding the inefficiency of multiple trials. Indeed, Mr. Messer was incarcerated during the period of preindictment delay, meaning that any course of criminal conduct must, per force, have already come to an end.

and near the end of Mr. Messer's sentence for the predicate acts, Respondent sought the RICO indictment. Not only was this delay not investigative, it appears to have been an act of retaliation against Mr. Messer personally. First, Mr. Messer's father had been a career criminal, and his family had a poor reputation with the local law enforcement community. Second, Mr. Messer is a named plaintiff in a civil suit against Clermont County.[11] Clermont County and Brown County officials engaged in dramatic, destructive excavations of a residential property owned by Mr. Messer and his mother, Jeanette Spangler. This excavation, down to a depth of 22 feet, resulted in significant damage to structures on the property and to the septic system. Additionally, cars, tools, and other personal property were buried under tons of dirt, not only depriving Mr. Messer of such property but preventing backfilling of the hole created by the excavations. This hole then filled with water. The excavations concluded in May, 2004. Interestingly, Mr. Messer's counsel at that time contacted government officials and declared Mr. Messer's intent to sue for violations of his and of his mother's civil rights and for the government's wanton and willful misconduct. Respondent's indictment of Mr. Messer issued approximately four months later, on September 22, 2004. (App. 2a).[12]

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[11] The suit, *Spangler v. Wenninger*, is in the U.S. District Court for the Southern District of Ohio, Case No. 1:06-cv-00229-MRB.

[12] The Clermont County Prosecutor's Office obtained the RICO indictment against Mr. Messer. The Clermont County Sheriff's Office and the Clermont County Board of Commissioners are

Finally, the Court in *Lovasco* stated that "requiring the Government to make charging decisions immediately upon assembling evidence sufficient to establish guilt would preclude the Government from giving full consideration to the desirability of not prosecuting in particular cases." *Id.* at 794. Surely, here, seventeen months was enough time for the State to give "full consideration to the desirability of not prosecuting" in this case. In his concurrence in *MacDonald*, Justice Stevens remarked that "the interest in allowing the Government to proceed cautiously and deliberately before making a final decision to prosecute for such a serious offense is of decisive importance for me in this case." In this case, the State certainly had the opportunity to "proceed cautiously and deliberately before making a final decision to prosecute." 456 U.S. at 11. The delay appears to have been occasioned by other considerations, as noted above.

II. OHIO LAW PROVIDES PROTECTION OF THE RIGHT TO A SPEEDY TRIAL DISTINCT FROM THE FEDERAL CONSTITUTION, AND THEREFORE RESPONDENT VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY MISAPPLYING OHIO LAW AND PRECEDENT

Ohio law provides protections of the right to a speedy trial distinct from federal constitutional protections provided by the Sixth Amendment. *See e.g. State v. Wood*, 81 Ohio App.3d 489, 611 N.E.2d 418

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named as defendants in the civil suit. Photographs of the excavation may be found in Appendix J, beginning at App. 86a.

(1992); *State v. Taylor*, Not Reported in N.E.2d, 2002 WL 31862688 (Ohio App. 11 Dist. 2002); *State v. Adams*, 43 Ohio St.3d 67, 538 N.E.2d 1025 (1989); *State v. Homan*, 89 Ohio St.3d 421, 732 N.E.2d 952, 2000-Ohio-212 (2000); *State v. Parker*, 113 Ohio St.3d 207, 863 N.E.2d 1032, 2007-Ohio-1534; *cf. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497; *Lovasco*, 431 U.S. 783, 97 S.Ct. 2044; *Marion*, 404 U.S. 307, 92 S.Ct. 455. In *Wood*, the Ohio Supreme Court held that

> When new and additional charges arise from the same facts as did the original charge and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charge is subject to the same statutory limitations period that is applied to the original charge. Any other interpretation would clearly frustrate the purposes of the speedy trial statute.

81 Ohio App.3d at 492.

In *Homan*, the Ohio Supreme Court held that "[w]hen a criminal defendant files a pretrial motion and the state later files against the defendant additional, related criminal charges, . . . , the time within which the defendant must be brought to trial on those additional charges" is not extended. 89 Ohio St.3d at 421 (syllabus). In *Parker*, the Ohio Supreme Court held that "when multiple charges arise from a criminal incident and share a common litigation history, pretrial incarceration on the multiple charges constitutes incarceration on the 'pending charge' for the purposes of the triple-count provision of the [Ohio] speedy-trial statute, R.C. 2945.71(E)." 113 Ohio St.3d

at 211. Further, the same opinion added that "[c]riminal charges arising out of the same criminal incident and brought simultaneously will always be deemed to have a 'common litigation history' for the purposes of establishing incarceration solely on the 'pending charge' within the meaning of R.C. 2945.71(E), even if they are prosecuted in separate jurisdictions." *Id.* at 212.

Under Ohio law, therefore, the time during which Respondent was required to bring Mr. Messer to trial on the RICO indictment should have been calculated from his conviction for the last of the predicate offenses upon which the RICO indictment was founded. O.R.C. § 2945.71(C)(2) requires that a defendant charged with a felony be brought to trial within 270 days of his arrest. Mr. Messer entered his plea 604 days after his arrest, which was some 924 days after his conviction for the last of the RICO predicate acts. Indeed, the Clermont County prosecutor conceded, during the hearing on Mr. Messer's July 28, 2006, motion to dismiss, that the above understanding of Ohio law would mean that the statutory time for bringing Mr. Messer to trial on the RICO indictment would already have lapsed.

In *Duncan v. Louisiana*, the Court enumerated the Sixth Amendment right to a speedy trial as one of the fundamental rights protected by the constitution and applied to the states through the Fourteenth Amendment. Specifically, the Court held that the "Fourteenth Amendment denies the States the power to 'deprive any person of life, liberty, or property, without due process of law,' and noted that "that clause now protects . . . the Sixth Amendment rights to

counsel [and] to a speedy and public trial . . . ." 391 U.S. 145, 147-48, 88 S.Ct. 144 (1968) *See also Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056 (1969).

This Court has recognized claims brought under the Equal Protection Clause based on the "class of one" theory. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000); see also *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 109 S.Ct. 633 (1989); *Sioux City Bridge Co. v. Dakota Cty.*, 260 U.S. 441, 43 S.Ct. 190 (1923). In *Village of Willowbrook*, the Court said that its cases "have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." 528 U.S. at 564.

The Sixth Circuit, applying this theory, held that a "'class of one' plaintiff may demonstrate that a government action lacks a rational basis in one of two ways: either by 'negativ[ing] [sic] every conceivable basis which might support' the government action or by demonstrating that the challenged government action was motivated by animus or ill-will." *Warren v. City of Athens, Ohio*, 411 F.3d 697, 711 (6th Cir. 2005). As indicated in § I.B, *supra*, Mr. Messer is a party plaintiff in a civil suit against Respondent. Hardly four months after the events which gave rise to this suit, and after Mr. Messer's counsel at the time indicated that Mr. Messer would pursue action against Respondent, Respondent obtained the RICO indictment. Respondent's indictment of Mr. Messer, and its refusal to apply the same speedy trial standard to Mr. Messer as applies to other Ohio criminal

defendants, is a due process violation and a violation of Mr. Messer's right to the equal protection of the laws.

III. EXCESSIVE PREINDICTMENT DELAY UNDER CRIMINAL STATUTES WITH PROTRACTED STATUTES OF LIMITATIONS EVISCERATES THE PROTECTION OF THE SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL OTHERWISE PROVIDED BY SUCH STATUTES

In a number of its decisions, this Court has held that the Sixth Amendment right to a speedy trial does not apply prior to the beginning of the adversary process, either by indictment or arrest. See e.g. *MacDonald*, 456 U.S. 1; *Lovasco*, 431 U.S. 783; *Marion*, 404 U.S. 307. The Court, in making this determination, relied heavily upon its reasoning that statutes of limitations are the primary protection against stale indictments. For example, in *U.S. v. Ewell*, the Court stated that "the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges." 383 U.S. 116, 122, 86 S.Ct. 773 (1966) (emphasis added).

This rationale is singularly inapposite in the context of the Ohio RICO law, given that the state may seek indictment for as little as two offenses committed in as long as a twelve-year period. O.R.C. § 2923.31(E). The Court has premised its reliance upon statutes of limitations to protect against the possibility that excessive preindictment delays could prejudice defendants based on the reasoning that limitations statutes "provide predictability by specifying a limit beyond which there is an irrebuttable presumption

that a defendant's right to a fair trial would be prejudiced." *Marion*, 404 U.S. at 322.

In *MacDonald*, Justice Marshall wrote a spirited dissent, in which Justices Blackmun and Brennan joined, taking the position that the Sixth Amendment should, in some cases, apply to lengthy preindictment delays. *See* 456 U.S. at 12. In *MacDonald*, the defendant had been charged with murder, a crime for which there is no statute of limitations, and Justice Marshall aptly noted that although "the statute of limitations will serve as protection in cases of preindictment delay," no such protection existed for the defendant in that case "since there is no statute of limitations for murder." 456 U.S. at 17, fn. 1. In *Lovasco*, Justice Stevens engaged in an equally spirited dissent. Specifically, he wrote that:

> The findings of the District Court, as approved by the Court of Appeals, establish four relevant propositions: (1) this is a routine prosecution; (2) after the Government assembled all of the evidence on which it expects to establish respondent's guilt, it waited almost 18 months to seek an indictment; (3) the delay was prejudicial to respondent's defense; and (4) no reason whatsoever explains the delay. We may reasonably infer that the prosecutor was merely busy with other matters that he considered more important than this case.
>
> The question presented by those facts is not an easy one. Nevertheless, unless we are to conclude that the Constitution imposes no

> constraints on the prosecutor's power to postpone the filing of formal charges to suit his own convenience, I believe we must affirm the judgment of the Court of Appeals. A contrary position "can be tenable only if one assumes that the constitutional right to a fair hearing includes no right whatsoever to a prompt hearing."

431 U.S. at 799-800 (quoting *Moody v. Daggett*, 429 U.S. 78, 91, 97 S.Ct. 274 (1976) (Stevens, J., dissenting)).

The rationale that statutes of limitations are the primary protection against stale indictments, in the context of prosecutions under the Ohio RICO statute, is similarly unpersuasive in light of the relatively long, potentially unending, time in which the government could choose to prosecute. Indeed, the limitations period should have begun to run as of November 7, 2003 (the date of the last of Mr. Messer's convictions for the predicate acts on which Respondent based the RICO indictment). O.R.C. § 2901.13(D) provides that in "the case of an offense of which an element is a continuing course of conduct, the period of limitation does not begin to run until such course of conduct or the accused's accountability for it terminates, whichever occurs first." Mr. Messer was incarcerated, so any criminal course of conduct associated with an enterprise must, per force, have been terminated.[13]

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[13] Under *Adams*, Mr. Messer's purported waiver of his trial rights would have been ineffective, because the statutory time during which Respondent would have had to bring Mr. Messer to trial

With a protracted and potentially indefinite limitations period, the statute of limitations applicable to the Ohio RICO law provides little, if any, protection against stale indictments. Such indefinite limitations provides none of the "predictability" referenced in the *Marion* opinion. 404 U.S. at 322. Petitioner respectfully suggests, therefore, that the Court should consider the question of whether federal Sixth Amendment guarantees of the right to a speedy trial should apply to the preindictment period in cases such as this.

IV. THE CIRCUITS ARE SPLIT

The Circuit Courts are split over which is the correct test for deciding whether a preindictment delay is a violation of the Fifth Amendment right to due process. The First, Second, Third, Tenth, and Eleventh Circuits have required "a showing of prosecutorial misconduct designed to obtain a tactical advantage over the defendant or to advance some other impermissible purpose in order to establish a due process violation." *Hoo*, 484 U.S. at 1035-36; *U.S. v. Lebron-Gonzalez*, 816 F.2d 823 (1st Cir. 1987); *U.S. v. Lovasco*, 825 F.2d 667 (1987); *U.S. v. Ismaili*, 828 F.2d 153 (3d. Cir. 1987); *U.S. v. Jenkins*, 701 F.3d 850 (10th Cir. 1983); *U.S. v. Caporale*, 806 F.3d 1487 (11th Cir. 1986).

The Fourth and Ninth Circuits, however, have applied a balancing test according to which the court

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would already have run. 43 Ohio St.3d at 69-70. *See* Statement of the Case, § I, *supra*.

should weigh the prejudice to the defendant against the government's reason for delay in bringing indictment. *U.S. v. Automated Medical Labs., Inc.*, 770 F.2d 399 (4th Cir. 1985); *U.S. v. Valentine*, 783 F.2d 1413 (9th Cir. 1986). The U.S. District Court for the Northern District of Illinois noted that the "Fourth and Ninth Circuits have explicitly eschewed the bad faith requirement in favor of a lesser showing of government culpability in cases where the defendant has been greatly prejudiced by the delay." *Sabath*, 990 F. Supp. at 1017.

Panels in the Fifth and Seventh Circuits have reached decisions which conflict with decisions from within their own circuits. *See Dickerson v. Louisiana*, 816 F.3d 220 (5th Cir. 1987); *U.S. v. Hollins*, 811 F.2d 384 (7th Cir. 1987). The Fifth Circuit in particular seems to have struggled with the correct standard. In *U.S. v. Townley*, the Fifth Circuit applied a balancing test which weighed the extent of prejudice suffered by a defendant against the government's reasons (even good faith reasons) for delay. 665 F.2d 579 (5th Cir. 1982). Later, in *U.S. v. Crouch*, the Fifth Circuit, sitting en banc, rejected this approach in favor of a test under which "dismissal for preindictment delay requires a showing not only of substantial, actual prejudice, but also that the prosecutor intentionally delayed to gain tactical advantage or to advance some other improper purpose." 84 F.3d 1497, 1511 (5th Cir. 1996). Supporting its decision, but underscoring the persistent conflict among the circuits, the court also noted that "[a] significant majority of our sister circuits area to now follow the same rule." *Id.* (emphasis added). In light of the continuing confusion and disagreement among the circuit courts regarding

the appropriate test for deciding whether a preindictment delay in criminal cases is a due process violation, this case presents the Court with an excellent opportunity to settle the question.

CONCLUSION

For all of the reasons set forth above, Petitioner, Jarrod W. Messer, respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

CASE NO. CA2006-10-084

[Filed November 5, 2007]

STATE OF OHIO,	)
	)
Plaintiff-Appellee,	)
	)
-vs-	)
	)
JARROD W. MESSER,	)
	)
Defendant-Appellant.	)
	)

OPINION

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2004CR0720

Donald W. White, Clermont County Prosecuting Attorney, David Henry Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

Scaccia & Associates, LLC, John J. Scaccia, 536 West Central Avenue, 2nd Floor, Springboro, Ohio 45066, for defendant-appellant

WALSH, J.

{¶1} Defendant-appellant, Jarrod William Messer, appeals a decision of the Clermont County Court of Common Pleas overruling his motion to dismiss indictment on speedy trial grounds after which he pled no contest to attempted engaging in a pattern of corrupt activity. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} On September 22, 2004, appellant was indicted on one count of engaging in a pattern of corrupt activity, a first degree felony under Ohio's Racketeer Influenced and Corrupt Organizations (RICO) statute, R.C. 2923.32(A)(1). The indictment was based upon seven predicate acts committed by appellant between June 2002 and April 2003. The arraignment, scheduled for September 30, 2004, was continued because service of the warrant on the indictment had not yet been perfected upon appellant. The warrant was entered into the computerized databank, National Crime Information Center (NCIC), sometime between September 22, 2004 and September 30, 2004.

{¶3} In November 2004, appellant's counsel notified Clermont County officials that appellant was already incarcerated. Appellant was arrested on the present indictment on December 15, 2004. The case was continued a number of times, at appellant's request. On July 28, 2005, appellant filed a motion to

dismiss the indictment on speedy trial grounds. The motion was heard on August 3, 2005. In a decision issued on August 11, 2005, the trial court overruled appellant's motion. That same day, appellant pled no contest to an amended charge of attempted engaging in a pattern of corrupt activity under R.C. 2923.02(A) and 2923.32(A)(1). Appellant was thereafter sentenced to five years of community control. Appellant timely appeals, raising one assignment of error.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT COMMITTED PREJUDICAL [SIC] ERROR BY NOT DISMISSING THE R.I.C.O. CHARGE FOR VIOLATION OF APPELLANT'S SPEEDY TRIAL RIGHTS PROTECTED BY ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND/OR OHIO REVISED CODE SECTION 2945.71."

{¶6} In challenging the trial court's refusal to dismiss the RICO charge on speedy trial grounds, appellant raises two issues for our review. First, appellant argues that the trial court erred in failing to allow credit for the time running on the previously indicted charges when, according to appellant, the RICO charge was based on the same sets of facts which gave rise to the prior charges. Second, appellant contends that the trial court erred in failing to allow credit for the time running after the indictment on the RICO charge.

{¶7} Appellate review of speedy-trial issues involves a mixed question of law and fact. *State v.*

High, 143 Ohio App.3d 232, 242, 2001-Ohio-3530. A reviewing court must give due deference to the trial court's findings of fact if they are supported by competent, credible evidence, but will independently review whether the trial court correctly applied the law to the facts of the case. Id.

{¶8} Both the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution guarantee a criminal defendant the right to a speedy trial. *State v. Baker*, 78 Ohio St.3d 108, 110, 1997-Ohio-229. In order to determine whether this constitutional right has been violated, a court should weigh the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and the prejudice to the defendant as a result of the delay. *Barker v. Wingo* (1972), 407 U.S. 514, 530, 92 S.Ct. 2182.

{¶9} Applying the above factors to this case, we find no deprivation of appellant's constitutional speedy trial rights. Courts reviewing post-accusation delay have considered delays from the date of indictment to the date of arrest as well as from the date of indictment or arrest to the date of trial. See, e.g., *State v. Webb*, Washington App. No. 01CA32, 2002-Ohio-3552, ¶25; *State v. Carter* (Apr. 1, 1998), Lorain App. No. 97CA006703, 1998 WL 150380, at *3. The 84-day delay between appellant's indictment and arrest, occasioned by the state's inability to locate appellant, was not presumptively prejudicial. See, e.g., *State v. Miller*, Franklin App. No. 04AP-285, 2005-Ohio-518, ¶12 (76-day delay not presumptively prejudicial); *Webb* at ¶26 (186-day delay not presumptively prejudicial). The entry of continuance

stated that the matter was continued until appellant was located for service of the warrant on indictment, and that the speedy trial time was tolled as a result. The state checked a computerized databank to see if appellant was incarcerated. The state also entered the warrant into the NCIC and sent a teletype notification to the jurisdiction at appellant's last known address. The state was reasonably diligent in attempting to notify appellant of the pending charge, and the speedy trial time was tolled as a result of appellant's unavailability. *State v. Selvage*, 80 Ohio St.3d 465, 469, 1997-Ohio-287. See, also, *State v. Packard* (1988), 52 Ohio App.3d 99, 101 ("The sheriff's department could not and should not be expected to initiate a multiple-county or statewide dragnet to track down one individual[.]").

{¶10} As for post-arrest delay, the time lapse between appellant's arrest and his no contest plea on August 11, 2006, the same day as the trial court decision denying appellant's motion to dismiss, was 604 days. Because this exceeds one year, the delay was presumptively prejudicial and the remaining *Baker* factors must be addressed. *Selvage* at 468, citing *Doggett v. United States* (1992), 505 U.S. 647, 652, 112 S.Ct. 2686 (providing "courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year").

{¶11} A review of the record reveals that the delays in the case resulted almost entirely from appellant's numerous requests for continuances, changes in counsel, and requests for discovery. The record documents that appellant waived his speedy trial rights each time these continuances were granted. In

addition, appellant's counsel filed a "blanket" speedy trial waiver on May 26, 2005. This waiver was not revoked until appellant filed his motion to dismiss the indictment on speed trial grounds on July 28, 2006. *State v. Masters*, Crawford App. No. 3-06-20, 2007-Ohio-4229, ¶26. Under such circumstances, we find no prejudice to appellant where he caused most of the delay and continually waived his speedy trial rights. Appellant's constitutional right to a speedy trial was therefore not violated.

{¶12} Next we turn to appellant's statutory speedy trial right. In Ohio, the General Assembly enacted a statutory scheme to protect a defendant's speedy trial rights. See R.C. 2945.71 et seq. Generally, when an accused is charged with a felony, he must be brought to trial within 270 days after the date of his arrest. R.C. 2945.71(C)(2). The day of the arrest is not included in the count. *State v. Steiner* (1991), 71 Ohio App.3d 249, 250-51. When an accused is held in jail on the pending charge in lieu of bail, each day is counted as three days. R.C. 2945.71(E).

{¶13} In this appeal, the fundamental threshold issue in our statutory speedy trial analysis is whether the speedy-trial timetable in a case involving a RICO charge begins to run upon the dates of arrest for the RICO predicate acts or upon the date of arrest for the RICO charge itself. The Ohio Supreme Court has specifically addressed the issue of multiple indictments in relation to Ohio's speedy trial statute. In *State v. Adams* (1989), 43 Ohio St.3d 67, the high court held:

{¶14} "When new and additional charges arise from the same facts as did the original charge and the

state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charge is subject to the same statutory limitations period that is applied to the original charge." Id. at 68.

{¶15} By definition, a RICO charge involves a *pattern* of corrupt activity: "No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity * * * ." R.C. 2923.32(A)(1). Ohio's RICO statute defines a "pattern" as:

{¶16} "[T]wo or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event." R.C. 2923.31(E).

{¶17} Therefore, a person must engage in separate incidents which demonstrate a continuing course of criminal conduct before the state may indict on a RICO charge. See, e.g., *State v. Hicks,* Butler App. No. CA2002-08-198, 2003-Ohio-7210, ¶32-35. Included within the ambit of "corrupt activity" are, inter alia, the offenses of aggravated possession of drugs, receiving stolen property, and felonious assault. R.C. 2923.31(I)(2)(a), (c).

{¶18} The RICO charge in this case was based upon seven predicate offenses, which appellant committed on the following respective dates: June 7, 2002 (aggravated possession of drugs); June 16, 2002

(receiving stolen property); July 15, 2002 (aggravated possession of drugs); November 24, 2002 (receiving stolen property); November 25, 2002 (receiving stolen property); January 11, 2003 (felonious assault); and April 23, 2003 (receiving stolen property). The state did not know of all the facts necessary for the RICO charge when the indictments for the predicate offenses were issued. It was not until appellant engaged in conduct which arguably formed a pattern of corrupt activity that the state was able to file a RICO charge against him. Because the state did not possess all of the facts leading to the RICO charge at the time of the initial indictments, the same speedy trial time does not apply to the predicate offenses and the RICO charge. *Adams*, 43 Ohio St.3d at 68. The speedy trial timetable for the RICO charge thus began to run upon the date of appellant's arrest for the RICO charge itself, not upon the dates of arrest for the predicate acts upon which the RICO charge was based.

{¶19} As stated, the time lapse between appellant's arrest on the RICO charge and his no contest plea amounted to 604 days. This exceeds the 270-day statutory deadline. However, the time within which an accused must be brought to trial may be extended by any of the tolling events contained in R.C. 2945.72. These include unavailability of the accused for hearing or trial due to his involvement in other criminal proceedings, any period of delay necessitated by a motion of the accused, any continuances granted on the accused's own motion, any period of reasonable continuance granted other than upon the accused's own motion, and any period of delay resulting from the neglect or improper act of the accused. Id.

{¶20} Appellant was arrested on December 15, 2004. This day of arrest is not included in computing speedy trial time. *Steiner*, 71 Ohio App.3d at 250-51. Although appellant was incarcerated at the time of his arrest, he was not held in jail *solely* on the pending RICO charge in lieu of bail. Accordingly, the triple count provision of R.C. 2945.71(E) is inapplicable. *State v. Davenport*, Butler App. No. CA2005-01-05, 2005-Ohio-6686, ¶9. See, also, *State v. MacDonald* (1976), 48 Ohio St.2d 66, 69; *State v. Dankworth*, 172 Ohio App.3d 159, 2007-Ohio-2588, ¶32; *State v. Taylor* (Oct. 5, 2001), Lucas App. No. L-98-1375, 2001 WL 1198648, at *4.

{¶21} The Ohio Supreme Court recently addressed the issue of when multiple charges should be considered, collectively, as a "pending charge" within the meaning of R.C. 2945.71(E). In *State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534, the high court held the following:

{¶22} "[W]hen multiple charges arise from a criminal incident and share a common litigation history, pretrial incarceration on the multiple charges constitutes incarceration on the 'pending charge' for the purposes of the triple-count provision of the speedy-trial statute[.] * * * Criminal charges arising out of the same criminal incident and brought simultaneously will always be deemed to have a 'common litigation history' for the purposes of establishing incarceration solely on the 'pending charge' within the meaning of R.C. 2945.71(E), even if they are prosecuted in separate jurisdictions." *Parker* at ¶21, 25.

{¶23} Here, the RICO charge was not brought simultaneously with the charges for the predicate acts. It is a charge separate and distinct from the predicate acts themselves, and does not share a common litigation history with them. The *Parker* decision thus does not mandate that the triple-count provision be applied under the facts of the case sub judice. We therefore continue our analysis within the confines of the 270-day statutory speedy trial deadline.

{¶24} On December 16, 2004, the day after appellant's arrest, he appeared pro se at his arraignment. There, he waived his right to a speedy trial and requested a continuance. The trial court continued the case to December 23, 2004. When that date approached, the court again continued the case to December 30, 2004 at appellant's request. As a result, no days of speedy trial time elapsed. Appellant was arraigned on December 30, 2004.

{¶25} Eight days of speedy trial time passed from the date of appellant's arraignment to the January 7, 2005 pretrial hearing. At that hearing, the trial court again continued the case to February 18, 2005 at appellant's request. At the February 18 hearing, the case was continued to March 18, 2005 at appellant's request. On March 17, 2005, the case was continued to April 8, 2005 at appellant's request. The speedy trial time clock ran from April 8, 2005 to May 10, 2005 for an additional 32 days of time, bringing the total to 40 days.

{¶26} On May 10, 2005, the case was continued to May 26, 2005 at appellant's request. On May 26, 2005, appellant filed a "blanket" time waiver. Such an

unlimited waiver must be formally withdrawn by written motion before a defendant my reassert his right to a speedy trial. *State v. O'Brien* (1987), 34 Ohio St.3d 7, 9. Following the filing of a written motion objecting to further continuances, the state must bring the defendant to trial within a reasonable time. Id.

{¶27} Appellant requested a number of continuances throughout the time covered by the blanket waiver. These would have tolled the time as well. He also filed requests for discovery and a bill of particulars, and a motion to dismiss the indictment on double jeopardy grounds.

{¶28} Appellant never formally withdrew the blanket time waiver, but his motion to dismiss the indictment on speedy trial grounds, filed on July 28, 2006, effectively revoked it. *Masters*, 2007-Ohio-4229 at ¶26. The filing of this motion to dismiss by appellant again acted as a tolling event, so no speedy trial time accumulated from the filing of the motion until it was ruled on. The court issued its decision on appellant's motion to dismiss on August 11, 2006. Appellant entered his no contest plea that same day.

{¶29} The total speedy trial time attributable to the state from the date of appellant's arrest to the trial court's decision on appellant's dismissal motion is 40 days. This is well within the statutory time frame. Appellant's statutory right to a speedy trial was therefore not violated.

{¶30} Appellant cites the holdings in *State v. Adams* (1989), 43 Ohio St.3d 67 and *State v. Homan*, 89 Ohio St.3d 421, 2000-Ohio-212 for the proposition

that any speedy trial waivers that occur for initial charges should not apply to subsequently brought charges. This reliance is premised upon appellant's argument that the same speedy trial time line be applied to the charges for the predicate offenses and the RICO charge. Because we have concluded that the RICO offense is afforded its own speedy trial time line, appellant's reliance upon *Adams* and *Homan* is misplaced.

{¶31} We conclude that appellant was not denied his constitutional or statutory speedy trial rights. Appellant's assignment of error is overruled.

{¶32} Judgment affirmed.

YOUNG, P.J., and BRESSLER, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/ROD/documents/. Final versions of decisions are also available on the Twelfth District's web site at: http://www.twelfth.courts.state.oh.us/search.asp

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

CASE NO. CA2006-10-084

[Filed November 5, 2007]

STATE OF OHIO,	)
	)
Plaintiff-Appellee,	)
	)
-vs-	)
	)
JARROD WILLIAM MESSER,	)
	)
Defendant-Appellant.	)
	)

JUDGMENT ENTRY

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Clermont County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

/s/
William W. Young, Presiding Judge

/s/
H.J. Bressler, Judge

/s/
James E. Walsh, Judge

APPENDIX B

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

CASE NO. 2004 CR 00720

[Filed September 26, 2006]

STATE OF OHIO,	)
	)
PLAINTIFF,	)
	)
VS.	)
	)
JARROD WILLIAM MESSER,	)
	)
DEFENDANT.	)
	)

JUDGMENT ENTRY SENTENCING DEFENDANT TO COMMUNITY CONTROL

On the 11th day of August, 2006, the defendant appeared in open court, represented by attorney John Scaccia, and entered a plea of guilty and was found guilty of Attempted Engaging in Pattern of Corrupt Activity, contrary to and in violation of Section 2923.02/2923.32 of the Revised Code, a felony of the third degree.

On the 20th day of September, 2006, the defendant's sentencing hearing was held pursuant to Ohio Revised Code Section 2929.19. Defense attorney John Scaccia and Assistant Prosecuting Attorney Scott C. Smith were present as was the defendant, who stated that he did not have anything to say as to why sentence should not be imposed upon him. The defendant was afforded all of his rights pursuant to Crim. R. 32.

The court has considered the record, oral statements, victim impact statement, and pre-sentence report, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code Section 2929.12. The court has further considered the defendant's present and future ability to pay the amount of any financial sanction which might be imposed.

The court finds that the defendant has been convicted of Attempted Engaging in Pattern of Corrupt Activity, contrary to and in violation of Section 2923.02/2923.32[(A)(1) [JRM]] of the Revised Code, a felony of the third degree.

The court finds for reasons stated on the record that the defendant's conduct is neither more serious nor less serious than conduct normally constituting the offense.

The court finds for reasons stated on the record that the defendant is more likely rather than less likely to commit future crimes.

For reasons stated on the record, and after considering the factors under R.C. 2929.12, the court finds that community control sanctions are consistent with the purposes and principles of sentencing; that prison is not consistent with the purposes and principles of sentencing; and that the defendant is amenable to available community control sanctions.

IT IS THEREFORE ORDERED that the defendant shall be sentenced to five years of community control under the general control and supervision of the Adult Probation Department for the purpose of reporting to the court a violation of any of the sanctions which are hereinafter set forth or the mandatory condition imposed under (C) (1) (b) of section 2951.02 of the Revised Code subject to the jurisdiction of the court over and with respect to the person of the defendant, and to the rules governing the Adult Probation Department. The sanctions of community control shall be as follows.

1. The defendant shall abide by all Federal, State, and Local laws, and shall personally contact his probation officer on the next business day if he is arrested, cited, or questioned by any law enforcement officer.

2. The defendant shall be subject to basic supervision by the Probation Department for the five year period of community control.

3. The defendant shall report to the Adult Probation Department as instructed by any of the Adult Probation Department personnel, and shall not absent himself from the State of Ohio for more than

twenty-four (24) hours without the written permission of the Probation Department. No appointment with a probation officer may be changed except through consultation with the probation officer.

4. The defendant shall keep the Probation Department advised of his actual residence at all times during the period of his community control. The defendant shall report to the Probation Department any change in residence within twenty-four (24) hours of the change. Any change of residence must be pre-approved by the Probation Department.

5. The defendant shall follow his probation officer's verbal or written instructions, shall answer truthfully all questions placed to him by any Adult Probation Department personnel, shall cooperate with the Adult Probation Department personnel, and shall conduct himself appropriately at all times.

6. The defendant shall not enter upon the grounds of any correctional facility or attempt to visit any prisoner without the permission of his probation officer, and shall not communicate with any prisoner in any manner without obtaining permission from his probation officer.

7. The defendant shall be assessed as to the need for substance abuse treatment and counseling through T.A.S.C. and shall participate substance abuse treatment and counseling as recommended through this assessment and/or as recommended by any subsequent treatment provider.

8. The defendant shall participate in and successfully complete any additional substance abuse and/or mental health treatment and counseling as directed by the Probation Department.

9. The defendant shall pay a supervision fee of $50.00 per month, subject to a total maximum supervision fee of $500.00 within a reasonable period of time (to be determined by the Probation Department).

10. The defendant shall pay the court costs. All payments shall be made in a timely manner.

11. The defendant shall pay support for his minor child as ordered by any court of competent jurisdiction.

12. The defendant shall not consume or possess any alcoholic beverages and shall not consume or possess drugs (controlled substances) unless prescribed by a physician. The defendant shall report to the Probation Department the names of any medical providers who prescribe him medication, shall continually inform the Probation Department of any prescription drug usage, and shall provide documentation as requested of his medical treatment or of any drug prescriptions. The defendant shall permit any type of test or sample to be taken for the purpose of discovering alcohol or drug use.

13. The defendant shall execute appropriate waivers/medical releases/releases to treatment providers if requested by the Probation Department in order to allow full disclosure and release of records/information to the Probation Department from

the defendant's medical treatment providers. The defendant shall execute any other waivers and/or releases of information/records which the Probation Department requests in order to verify that the defendant is complying with the sanctions that have been ordered or to allow the Probation Department to obtain information as to the physical or mental condition of the defendant.

14. The defendant shall not enter upon the premises of any business or that portion of the premises of any business, the primary income of which is derived from the sale of alcoholic beverages or the primary activity of which involves the sale of alcoholic beverages.

15. The defendant shall not associate with persons having criminal background and/or persons who may have gang affiliation, or who could influence him to engage in criminal activity. In addition, the defendant shall refrain from all forms of illegal gambling.

16. The defendant shall remain verifiably employed for a minimum of forty (40) hours per week and shall not quit a job until other steady employment is obtained. Any employment must be verifiable, must be subject to tax withholding, and shall be subject to preapproval by the Probation Department. During periods of unemployment, the defendant shall actively pursue applications for employment at the direction of her probation officer. Any change of employment must be pre-approved the Probation Department. During periods of unemployment, the defendant shall actively pursue applications for employment at the directed of his probation officer.

17. The defendant shall not own, carry, purchase, possess, use, or have ready at hand any firearm, or any dangerous ordnance. Additionally, the defendant shall not live in a residence where firearms are kept.

18. The defendant shall submit to a warrantless search and seizure of his person, place of residence, motor vehicle, personal property, and real property, conducted by a probation officer of the Common Pleas Court.

19. The Defendant shall submit to DNA testing as directed by the Probation Department.

20. The Defendant shall submit to random polygraph examinations as directed by the Probation Department, and shall be truthful in all responses to the polygraph examiner, any treatment provider, and the Probation Department.

IT IS FURTHER ORDERED, and notice is hereby given to the defendant that violation of any of this sentence shall lead to more restrictive sanctions, longer control sanctions, or a prison term of five (5) years, which is the specific prison term that may be imposed for any violation of a community control sanction.

IT IS FURTHER ORDERED, and notice is hereby given to the defendant, that as part of this sentence post-release control is optional in this case up to a maximum of three (3) years. The defendant shall be subject to post-release control of up to three years after the defendant's release from confinement of the parole board determines that a period of post-release

control is necessary for the defendant. If the defendant violates a post-release control sanction imposed as a component of the post-release control, including the mandatory condition described in Revised Code Section 2967.131(A), the parole board may impose a more restrictive or longer control sanction, may increase the duration of the post-release control subject to the maximum three years, or may return the defendant to prison for up to nine months for each violation up to maximum of one-half of the stated prison term. If the violation is a new felony, the defendant may receive a prison term of the greater of one year or the time remaining on post-release control, in addition to any other prison term imposed for the new offense. The defendant is ordered to serve as part of this sentence any term of post-release control imposed by the parole board, and any prison term imposed for violation of that post-release control.

IT IS FURTHER ORDERED that the defendant shall pay a supervision fee of $50.00 per month subject to a total maximum supervision fee of $500.00 and the court costs.

IT IS FURTHER ORDERED that the defendant's bond, if any, shall be released.

IT IS FURTHER ORDERED that the defendant shall report to the Adult Probation Department in accordance with the provisions of this sentence.

Notice is hereby given to defendant that:

1. The defendant has a right to appeal the conviction and the sentence that has been imposed.

2. If the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment.

3. If the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost. A request for appointment of appointed counsel should be made in writing to the trial judge together with documentation supporting the defendant s contention that he is unable to obtain counsel.

4. If the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost.

5. The defendant has a right to have a notice of appeal timely filed on his behalf. If the defendant wishes to exercise this right, the notice of appeal must be filed within thirty days of the entry of judgment. Any request to have a notice of appeal timely filed should be communicated in writing to trial counsel and should be included in any request to the court for the appointment of counsel.

Dated 9-26-06

/s/
Jerry R. McBride, Judge

HAVE SEEN:

/s/
Scott C. Smith, #0075717
Assistant Prosecuting Attorney

REVIEWED:

_____

Defendant

_____

Address

APPENDIX C

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

CASE NO. 04-CR-00720

[Filed August 15, 2006]

STATE OF OHIO,	)
	)
PLAINTIFF,	)
	)
VS.	)
	)
JARROD MESSER,	)
	)
DEFENDANT.	)
	)

JUDGMENT ENTRY ON FINDING OF GUILTY AND ORDERING PRE-SENTENCE INVESTIGATION

On the 11th day of August, 2006 the Defendant appeared in Court, represented by counsel John Scaccia and entered a plea of no contest to Attempt Engage in Pattern of Corrupt Activity in violation of Section 2923.02-2923.32, of the Revised Code, a felony of the third degree.

Based on Defendant's plea and the statement of facts presented, the Court finds said plea knowingly, intelligently, and voluntarily made, that the Defendant understood the nature of the charges, and the full consequences of entering said plea, and the Court finds the Defendant guilty of Attempt Engage in Pattern of Corrupt Activity in violation of Section 2923.02-2923.32, of the Revised Code, a felony of the third degree.

This matter is referred to the Probation Department for its investigation and report and the Defendant shall appear before this Court at a later date for sentencing. The Defendant's bond, if any, shall continue for appearance for sentencing as ordered by the Court.

/s/
Jerry R. McBride, Judge

HAVE SEEN:

/s/
Scott C. Smith, #0075717
Assistant Prosecuting Attorney

APPENDIX D

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

Case No. 04 CR 00720

[Filed August 14, 2006]

STATE OF OHIO,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
JARROD W. MESSER	)
	)
Defendant.	)
	)

WRITTEN PLEA OF NO CONTEST

I withdraw my former not guilty plea and enter a plea of No Contest to the offense of:

Count	Offense and R.C. Section and Degree	Basic Prison Term	Possible Fine
1	Attempt Engaging in a Pattern of Corrupt Activities § 2923.02-§ 2923.32(A)(1) [F-3] (as amended)	1-5 years	$10,000

I understand the MAXIMUM penalty COULD be: a maximum basic prison term of 5 years, of which 0 is mandatory, during which I am NOT eligible for judicial release or community control. The maximum fine possible is $ 10,000 which $ 0 is mandatory. Restitution; other financial costs and _____ are possible in my case. If I am now of felony probation, parole, or community control, this plea may result in revocation proceedings and any new felony sentence may be imposed consecutively.

If I am sentenced to prison for a felony 1 or felony sex offense, after my prison release I will have 5 years of post release control under conditions determined by the parole board. If I am sentenced to prison for a felony 2 or felony 3 which involved causing or threatening physical harm, I will have mandatory post release control of 3 years. If I receive prison for a felony 3, 4, or 5, I may be given up to 3 years of post release control. If I violate conditions of supervision while under post release control, the parole board could return me to prison for up to 50% of my originally stated term. If the violation is a new felony, I could receive the time remaining on post release

control plus a prison term for the new crime. If this is a sexually oriented offense, I will be required to register with the Sheriff. The Sheriff may be required to tell my community of my crime and address.

8/11/06	/s/_____
Date	Signature of Defendant

APPENDIX E

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

CASE NO. 2004 CR 00720

[Filed August 11, 2006]

STATE OF OHIO,	)
	)
Plaintiff,	)
	)
vs.	)
	)
JARROD W. MESSER,	)
	)
Defendant.	)
	)

Scott Smith, assistant prosecuting attorney, for the plaintiff State of Ohio, 123 N. Third Street, Batavia Ohio 45103.

John J. Scaccia and Shawn P. Hooks, for the defendant Jarrod W. Messer, 130 West Second Street, 1400 First National Plaza, Dayton, Ohio 45402.

DECISION/ENTRY

This cause is before the court on two motions to dismiss filed by the defendant Jarrod Messer, the first

on the basis of double jeopardy and the second on the basis of the right to a speedy trial.

In the Clermont County Court of Common Pleas, the defendant has previously pled guilty to and been sentenced for receiving stolen property, illegal manufacture of drugs, and aggravated possession of drugs. During this same time frame, he has also resolved several other cases pending against him in Warren, Clinton, Brown, and Highland Counties, and he was sentenced to serve a prison term of two years.[1]

Subsequently, this case was brought against the defendant for the charge of Engaging in a Pattern of Corrupt Activity, under Ohio Revised Code Section 2923.32(A). This charge is based solely on the previously litigated predicated offenses.

A. Double Jeopardy

It is the defendant's contention that prosecution for the charge of engaging in a pattern of corrupt activity is in violation of the Double Jeopardy clause of the Fifth Amendment of the United States Constitution when the defendant has already been successfully prosecuted for the underlying predicate offenses.

"The Fifth Amendment to the United States Constitution provides that '[n]o person shall * * * be

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[1] Motion to Dismiss, pg. 1.

subject for the same offence to be twice put in jeopardy of life or limb."[2]

"The Fifth Amendment guarantee against double jeopardy consists of three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense"[3]

The Ohio Supreme Court has held that the "pattern of corrupt activity is demonstrated by the fact that the [defendant] committed the predicate offense. The General Assembly has determined that if a defendant has engaged in two or more acts constituting a predicate offense, he or she is engaging in a pattern of corrupt activity and may be found guilty of a RICO violation."[4]

In *State v. Nieves,* (Feb. 26, 1997), 9th Dist. No. 96CA6379, the defendant argued that convictions on both drug trafficking charges, which were predicate offenses, and the pattern of corrupt activity charge amounted to double jeopardy. That court held that

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[2] *State v. Zima* (2004), 102 Ohio St.3d 61, 65, 806 N.E.2d 542, 546.

[3] *State. v. Crago* (10th Dist., 1994), 93 Ohio App.3d 621, 629, 639 N.E.2d 801, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 23 L.Ed.2d 656, 664-665, 89 S.Ct. 2072, 2076-2077.

[4] *State v. DeMastry* (5th Dist., 2003), 155 Ohio App.3d 110, 119, 779 N.E.2d 229, citing *State v. Schlosser* (1997), 79 Ohio St.3d 329, 335, 681 NE.2d 911.

"[i]t is well-established that double jeopardy does not bar a RICO conviction and a separate conviction and sentence on a predicate offense, under either the federal RICO statute, or Ohio's RICO statute, which was patterned after federal law."[5] The appeals court went on to note that "[t]he Sixth Circuit Court of Appeals, in upholding the imposition of consecutive-sentences for violation of RICO and the accompanying predicate drug-trafficking offenses, stated that '[t]he clear legislative intent expressed concurrently with the enactment of RICO is to permit, perhaps even to encourage, courts to impose cumulative sentences for a RICO offense and the underlying crime.'"[6]

Ohio courts have consistently upheld the fact that double jeopardy does not bar a conviction under the federal or state RICO statutes and a separate conviction and sentence on the predicate offense.[7]

Ohio Revised Code 2923.32 "was enacted to criminalize the 'pattern of criminal activity' and not the underlying predicate acts. Its application depends

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[5] *Nieves*, citing, e.g., *U.S. v. Burgos* (4th Cir., 1996), 94 F.3d 849, 861.

[6] *Nieves*, citing *U.S. v. Sutton* (6th Cir., 1983), 700 F.3d 1078, 1081.

[7] *See, e.g., Nieves; State v. Haley*, (Mar. 30, 1994), 2nd Dist. Nos. 90-CA-79 and 90-CA-83; *State v. Hughes*, (Mar. 13, 1992), 2nd Dist. No. 90-CA-54.

upon the existence of a 'pattern of criminal activity' that violates an independent criminal statute."[8]

According to the statute itself as enacted by the General Assembly, a "'pattern of corrupt activity' means two or more incidents of corrupt activity, *whether or not there has been a prior conviction*, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event."[9] This language clearly indicates that a prior conviction may be used as a predicate offense for the charge of engaging in a pattern of corrupt activity.[10]

This court can find no support for the defendant's position. As a result, the motion to dismiss is not well-taken and shall be overruled.

B. Right to a Speedy Trial

The defendant's second motion to dismiss is based on his argument that his right to a speedy trial has been violated.

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[8] *Hughes*, citing *State v. Hill*, (Dec. 31, 1990), 5th Dist. No. CA-8094.

[9] *State v. Smith*, (June 28, 2000), 9th Dist. No. 99CA7387, citing O.R.C. 2923.31(E).

[10] Id.

(1) Constitutional Speedy Trial Analysis

The Sixth Amendment of the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee a criminal defendant the right to a speedy trial.[11]

"In *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, the United States Supreme Court set out a balancing test to determine whether a defendant has been deprived of his constitutional right to a speedy trial."[12] "A court should weigh the length of delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant caused by the delay in deciding whether the right has been violated."[13]

The *Barker* court noted that "[t]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily

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[11] *State v. Kerby* (2nd Dist., 2005), 162 Ohio App.3d 353, 360, 833 N.E.2d 757, at ¶ 17.

[12] *State v. Kelly*, (Dec. 30, 2005), 12th Dist. No. CA2004-12-104, 2005-Ohio-7032, at ¶ 11.

[13] Id.

dependent upon the peculiar circumstances of the case."[14]

The United States Supreme Court has also stated that "postaccusation delay [is] 'presumptively prejudicial' at least as it approaches one year."[15] The Ohio Supreme Court has held that "[t]he constitutional guarantees of a speedy trial are applicable to unjustifiable delays in commencing prosecution, as well as to unjustifiable delays after indictment.[16]

"The Ohio Supreme Court has recognized that a ten-month delay from the filing of a complaint to the issuance of an indictment is presumptively prejudicial."[17]

In *State v. Sears* (1st Dist., 2005), 166 Ohio App.3d 166, 849 N.E.2d 1060, the court concluded that the nine-month delay from the filing of the criminal

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[14] *Barker v. Wingo* (1972), 407 U.S. 514, 530-531, 92 S.Ct. 2182, 33 L.Ed.2d 101.

[15] *Armstrong v. Altiere*, (May 12, 2006), 11th Dist. No. 2006-T-0011, 2006-Ohio-2390, at ¶ 18, citing, *Doggett v. United States* (1992), 505 U.S. 647, 652, fn. 1, 112 S.Ct. 2686.

[16] *State v. Sears* (1st Dist., 2005), 166 Ohio App.3d 166, 168, 849 N.E.2d 1060, at ¶ 6, citing *State v. Meeker* (1971), 26 Ohio St.2d 9, 268 N.E.2d 589, paragraph three of the syllabus.

[17] *State v. Stamper*, (Feb. 7, 2006), 4th Dist. No. 05CA21, 2006-Ohio-722, at ¶ 17, citing *State v. Selvage* (1997), 80 Ohio St.3d 465, 468, 687 N.E.2d 433.

complaint to the time of the defendant's arrest was presumptively prejudicial.[18]

In the case sub judice, the indictment was issued on September 22, 2004. On September 30, 2004, the arraignment was continued because the warrant was still outstanding and the defendant was presumed to be at large. The Entry of Continuance indicates that Messer's Warrant on Indictment was entered in NCIC and TTY's were sent to the jurisdiction at Messer's last known address.

The defendant was eventually arrested on December 15, 2005, eighty-four days after the date of the indictment.

In *State v. Miller,* (Feb. 10, 2005), 10th Dist. No. 04AP-285, 2005-Ohio-518, at ¶ 12, the court concluded that a seventy-four day delay was not presumptively prejudicial and therefore the other *Barker* factors did not need to be weighed.[19]

The defendant in *State v. Pinson,* (Mar. 16, 2001), 4th Dist. No. 00CA2713, argued that the six and a half month delay between the issuance of the indictment and the time of his arrest violated his right to a speedy trial under the Sixth Amendment. The court concluded that "[t]he six and a half month delay alleged here

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[18] *Sears*, supra, at ¶ 12.

[19] *State v. Miller,* (Feb. 10, 2005), 10th Dist. No. 04AP-285, 2005-Ohio-518, at ¶ 12.

does not come close to approaching [the one year] threshold for presuming prejudice."[20]

In *State v. Carter,* (April 1, 1998), 9th Dist. No. 97CA006703, the court held that "the nine month period between indictment and service in the case sub judice does not constitute a 'presumptively prejudicial' delay for speedy trial purposes."

Based on the above case law, the court finds that the eight-four day delay between the indictment and the defendant's arrest is not presumptively prejudicial.

However, "[i]n *State v. Meeker*...the Ohio Supreme Court held "[t]he constitutional guarantees of a speedy trial *are applicable to unjustifiable delays in commencing prosecution,* as well as to unjustifiable delays after indictment."[21] Cases discussing post-accusation delay have considered delays both from date of indictment to date of arrest and date of indictment or arrest to the date of trial.[22]

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[20] *State v. Pinson,* (Mar. 16, 2001), 4th Dist. No. 00CA2713.

[21] *State v. Harrel* (Dec. 29, 1998), 5th Dist. No. 98CAA06029, 1999 WL 3887, at *2, citing, *State v. Meeker* (1971) 26 Ohio St.2d 9, 268 N.E.2d 589, paragraph three of the syllabus.

[22] See, e.g., *State v. Webb,* (July 12, 2002), 4th Dist. No. 01CA32, 2002-Ohio-3552, ¶ 25; *State v. Carter,* (April 1, 1998), 9th Dist. No. 97CA006703, 1998 WL 150380, *3.

"The constitutional guarantee of a speedy trial is not limited in scope to the period following formal arrest."[23]

In *State v. Himes*, (Dec. 12, 1988), 12th Dist. No. 88-01-007, 1988 WL 131981, the Twelfth District measured the defendant's constitutional speedy trial rights from the date of indictment. Additionally, the Ohio Supreme Court has held that "the filing of [a] criminal complaint triggered the speedy trial inquiry under *Barker*."[24]

Therefore, this court will begin measuring Messer's speedy trial right from the date of his indictment.

As a result, there has been more than a one year post-accusation delay, which is presumptively prejudicial, and an analysis of the *Barker* factors is required.

Under the first *Barker* factor, "the Ohio Supreme Court assigned weight to the length of the delay on the basis of what it identified as '[t]he interests which the Sixth Amendment was designed to protect-freedom from extended pretrial incarceration and from the disruption caused by unresolved charges[.]'"[25] In the

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[23] *State v. Grant*, 103 Ohio App.3d 28, 32, 658 N.E.2d 326, 329 (Ohio App. 9th Dist., 1995), citing *Doggett v. United States* (1992), 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520.

[24] *Selvage*, supra, 80 Ohio St.3d at 468-469.

[25] *State v. Worthy* (July 16, 1997), 9th Dist. No. 96CA006576, 1997 WL 422884, *2, citing, *State* v. *Triplett* (1997), 78 Ohio St.3d 566,

Triplett case, the defendant was incarcerated on different charges at the time he was awaiting trial and, as a result, the Court assigned "negligible weight in the defendant's favor to the fifty-four month delay she experienced."[26] Likewise, the court in *Worthy* held that the thirteen month delay between indictment and arrest weighed negligibly in the defendant's favor because he was incarcerated on other charges and, therefore, the delay in prosecution "did not effect his interests in freedom from pretrial incarceration and in avoiding disruption from unresolved charges."[27]

In this case, after his arrest for the charge in the case at bar, the defendant was still incarcerated on other charges. As a result, the length of the delay does not weigh as strongly in the defendant's favor as it would if he had been incarcerated solely on this pending charge.

The second *Barker* factor to be considered is the reason for the delay.

The defendant argues that the first delay occurred due to the state's negligence in ascertaining the location of the accused in order to serve him with the indictment. Courts throughout Ohio are "divided concerning whether the state has a duty to exercise reasonable diligence in notifying an incarcerated

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569, 679 N.E.2d 290, citing *Doggett*, supra.

[26] Id.

[27] Id.

defendant of the indictment against him."[28] "The Ninth Appellate District consistently holds that unless an incarcerated defendant follows the requirements of R.C. 2941.401, regardless of whether the prosecutor made any effort to serve the defendant in jail, the speedy trial time is not triggered."[29] The Second and Eleventh Districts have also followed this view."[30]

Likewise, the Twelfth District in the *Himes* case noted that there was no material prejudice because the defendant was not held in jail on the pending charge between the time of indictment and arrest and the delay was the result of negligence or oversight.[31]

Even if the pre-arrest delay weighs in favor of the defendant, it must also be noted that a significant period of the post-arrest delay that arose in this case can be attributed to the defendant. There were numerous continuances requested by and granted for the defendant, including a general waiver of his speedy trial rights signed by his counsel at the time, Seth Rubenstein. The defendant has also made two motions to dismiss in this case and a motion for a bill of

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[28] *State v. Boone*, (Mar. 3, 2003), 8th Dist. No. 81155, 2003-Ohio-996, ¶ 21.

[29] Id., citing, e.g., *Grant*, supra; *Worthy*, supra.

[30] Id., citing, *State v. Benson*, (Feb. 27, 1990), 2nd Dist. No. 11374, 1990 WL 19373; *State v. Miller*, 113 Ohio App.3d 606, 681 N.E.2d 970 (Ohio App. 11th Dist., 1996).

[31] *Himes*, supra, at *4.

particulars, and a reasonable time is allocated to responding to such requests and motions.[32]

Due to the fact that much of the time that has elapsed in this case since Messer's arrest can be attributed to the defendant, the court finds that the reasons for the delay do not weigh in favor of the defendant.

The third factor to be weighed is the defendant's assertion of his right to a speedy trial.

The United States Supreme Court has stated that a defendant has no duty to bring himself to trial.[33] "It is the burden of the state to ensure that a defendant is afforded a speedy trial."[34]

However, the United States Supreme Court has also held that "a defendant's assertion of, or failure to assert, the speedy trial right is a factor to consider in determining whether that right was denied."[35] "A defendant's timely assertion should be afforded moderate weight."[36]

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[32] See, e.g., *State v. Studer* (June 23, 1999), 3rd Dist. No. 10-98-20, 1999-Ohio-813, at *6.

[33] *State v. Osborn*, (Oct. 31, 2001), 9th Dist. No. 01CA007790, 2001-Ohio-1666, at *4, citing, *Barker*, supra, 407 U.S. at 527.

[34] Id.

[35] Id., citing *Barker* at 528.

[36] Id., citing, *Triplett*, supra, 78 Ohio St.3d at 570.

In the case sub judice, the defendant failed to assert his speedy trial rights for almost a year and a half after the date of his arrest. The defendant made a motion to dismiss in October 2005 which did not include a speedy trial claim. Therefore, the defendant's failure to assert his speedy trial rights in a reasonably timely fashion weighs moderately against the defendant in this case.

The final *Barker* factor is the prejudice experienced by the defendant. "In terms of the fourth factor, prejudice to the defendant can take three forms: lengthy incarceration, anxiety over unresolved criminal charges, and impediments to an effective defense."[37]

The United States Supreme Court has also noted that "[o]nce triggered by arrest, indictment, or other official accusation, however, the speedy trial enquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice that *Barker* recognized."[38]

In the case sub judice, the defendant was not materially prejudiced by the pre-arrest delay. He was incarcerated on another charge and, therefore, his freedom during this time was not affected.

After the defendant's arrest for the charge in the case at bar, he was incarcerated for approximately ten

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[37] *Baker* at 532.

[38] *Doggett*, supra, 505 U.S. at 665.

months until he posted bail in this case. However, he was also incarcerated on another charge during this time, which reduces the amount of prejudice experienced by the defendant as the result of the delay.

Also, the defendant has not alleged any material prejudice that has resulted from the post-arrest delay in his ability to present a defense in this case. The length of this delay has not prevented him from presenting witnesses on his behalf and there has been no loss of evidence alleged.

Therefore, the court finds that the defendant's constitutional right to a speedy trial has not been violated.

(2) Statutory Speedy Trial Analysis

In Ohio, the right to a speedy trial is implemented by the statutory scheme imposing specific time limits in R.C. 2945.71 et seq. The Ohio Supreme Court has said that "the provisions of R.C. 2945.71 implement the constitutional guarantee of a speedy trial found in the Constitution of Ohio, and thus 'are mandatory and must be strictly complied with by the state***.'"[39]

The statute at issue, R.C. 2945.71, governs specific time limits running from arrest or service of summons

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[39] *State v. Adams* (1989), 43 Ohio St.3d 67, 69, 538 N.E.2d 1025, 1027, citing *State v. Pudlock* (1975), 44 Ohio St.2d 104, 105, 338 N.E.2d 524, 525.

within which the accused must be brought to trial.[40] Therefore, any delay occurring before the defendant's arrest cannot be considered for the purposes of speedy trial time calculation under R.C. 2945.71.

R.C. 2945.71(C)(2) requires that a person against whom a felony charge is pending shall be brought to trial within two hundred and seventy days after the person's arrest. Each say the person is held in jail in lieu of bail on the pending charge is counted as three days.[41]

For a violation of the rights these sections confer, a defendant may seek a discharge from criminal liability pursuant to R.C. 2945.73.[42]

Once a criminal defendant shows that he was not brought to trial within the permissible period, the accused presents a prima facie case for release.[43] The state then has the burden to demonstrate that the criminal defendant was not entitled to release

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[40] *See, e.g.*, *State v. Knapp*, (April 3, 2006), 4th Dist. No. 05CA2835, 2006-Ohio-1717, at ¶ 8; *Barker*, supra, 2003-Ohio-5417, at ¶ 19; and R.C. 2945.71(C)(2).

[41] *Kerby*, supra, 162 Ohio App.3d 353, at ¶ 18, citing R.C. 2945.71(E).

[42] Id.

[43] *State v. Caudill*, (Dec. 2, 1998), 3rd Dist. No. 05-07-35, 1998 WL 833729, at *1, citing *State v. Butcher* (1986), 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368.

pursuant to tolling events contained in R.C. 2945.72.[44] These tolling provisions are to be strictly construed against the state.[45]

The time within which the accused must be brought to trial may only be extended for the reasons stated in R.C. 2945.72.[46] These reasons included any delay necessitated by a motion by the accused, any continuances granted on the accused's own motion, the period of any reasonable continuance granted other than upon the accused's own motion, and the period of delay occasioned by the: neglect or improper act of the accused.[47]

(a) *Homan* and *Adams*

It is the defendant's contention that the court should begin to count the speedy trial time in the case sub judice at the time of the defendant's arrest or convictions for the underlying predicate offenses.

"When computing statutory speedy trial time, R.C. 2945.71(E) requires that each day the accused is held in jail in lieu of bail on the pending charge be counted as three days. However, division (E) only applies if the accused is being held in jail *solely* on the pending

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[44] Id.

[45] Id., citing, *State v. Singer* (1977), 50 Ohio St.2d 103, 109, 362 N.E.2d 1216.

[46] *Caudill*, supra.

[47] Id., citing R.C. 2945.72.

charge."[48] This language suggests that if the defendant is being held in jail on charges other than the charge in the case at issue, that time will not be counted toward the speedy trial calculation.

The defendant relies extensively on *State v. Homan* (2000), 89 Ohio St.3d 421, 732 N.E.2d 952 for his position. In *Homan*, the defendant, who was charged with driving under the influence, filed a motion to suppress.[49] Subsequent to that filing, the state added an additional charge of child endangerment to the case against the defendant.[50] The state argued that the motion to suppress should toll speedy trial time both for the original charge and the new child endangerment charge.[51] The court concluded that R.C. 2945.72(E) could not be applied where the filing of the motion preceded the filing of the new charge.[52]

However, this case does not address the issue in the case sub judice. This is not a case in which time was waived and the state subsequently added charges in the case to be tried. In the case at bar, the only charge being tried is Engaging in a Pattern of Corrupt Activity. The state has not at any point in the duration

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[48] *State v. Armstrong*, (April 22, 1996), 4th Dist. No. 95CA2346, 1996 WL 194920, at *3.

[49] *Homan*, supra, 89 Ohio St.3d at 423.

[50] Id. at 427.

[51] Id.

[52] Id. at 428.

of this case filed any additional charges or a superseding indictment against the defendant.

Additionally, as the double jeopardy analysis above clearly demonstrates, Ohio courts have consistently held that the charge of engaging in a pattern of corrupt activity is a crime which is wholly separate and independent from the charge of the underlying predicate offenses. The court cannot concur with the defendant's suggestion that it must count the time served for the underlying predicate acts toward the speedy trial calculation in this case for engaging in a pattern of corrupt activity.

The defense also relies on *State* v. *Adams* (1989), 43 Ohio St.3d 67, 538 N.E.2d 1025, syllabus, which holds that "[w]hen an accused waives the right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver."

Based on *Adams*, the defendant argues that any waiver signed during any of the predicate cases cannot be applied to the case at hand to toll the speedy trial time. The defense is correct in this assertion. However, as discussed above, the prosecution of the underlying predicate offenses has no bearing on the speedy trial calculation in the case sub judice. Any waiver of time filed as well as any time served on these predicate offenses does not count toward the speedy trial time for the charge in this case.

(b) Speedy Trial Time Calculation

The indictment in the case sub judice was issued on September 24, 2004. On September 30, 2004 a continuance was granted which noted that the "Defendant is at large" and service on the warrant on indictment would be continued until the defendant could be found. This continuance states that the "time which the defendant must be brought to trial shall be extended by this period of time pursuant to R.C. 2945.72."

The defendant was not arrested on this indictment until December 15, 2004. The day of the defendant's arrest is not included in calculating the amount of time expired under the speedy trial statute.[53]

A bond hearing was the held on December 16, 2004. The arraignment hearing was continued at the defendant's request from December 16, 2004 until December 30, 2004. No days of speedy trial time elapsed as a result of this continuance.[54]

A second bond hearing was held on December 23, 2004. On that date, defendant's counsel again requested and was granted a continuance on arraignment.

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[53] *State* v. *Hudson* (8th Dist., 1983), 10 Ohio App.3d 52, 53, fn. 3,460 N.E.2d 668; *State v. Wright* (July 9, 1993), 4th Dist. No. 93 CA 2110; *State v. Ulmer* (Nov. 19, 1981), 8th Dist. No. 43444; *State v. Wallace* (Mar. 1. 1976), 1st Dist. No. C-75053; Crim.R. 45.

[54] R.C. 2945.72(H).

The defendant was arraigned on December 30, 2004.

It is the defendant's argument that the time between the issuance of the indictment on September 24, 2004 and the time of Messer's arraignment should be charged to the State because he was incarcerated in Ohio during this time and the State could have discovered this fact with due diligence.

However, as discussed previously, this pre-arrest delay between the issuance of the indictment and the date of arrest is not considered for the purposes of speedy trial time calculation under R.C. 2945.71.

Per Criminal Rule 45, "[i]n computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the date of the act or event from which the designated period of time begins to run shall not be included."

Therefore, the speedy trial time shall begin to be counted in this case on December 16, 2004. As noted above, on that date and on December 23, 2004, the defendant requested and was granted entries of continuance. Therefore, that time cannot be charged to the state.

The defendant was arraigned on December 30, 2004, and a $50,000 cash/professional bond was ordered at that time. A pretrial conference was then scheduled and held on January 7, 2005.

The speedy trial time ran during the eight days between the date of arraignment and the pretrial conference. However, the defendant is not entitled to a triple count for that time, because he was serving a prison sentence on a separate case at that time as indicated in the memorandum filed by defense counsel in support of the motion to dismiss.[55]

Another continuance was granted at the defendant's request from January 7, 2005 until February 18, 2005 for the setting of a second pretrial conference. No speedy trial time elapsed during the period of this continuance.[56]

The Pre-Trial set for February 18, 2005 was again continued per the defense counsel's request until March 18, 2005. The reason given was "Discovery." The Pre-Trial set for March 19, 2005 was then continued until April 8, 2005, by request of the defendant because of "discovery."

The defendant first argues that the Entry of Continuance, filed on February 23, 2005, which retroactively continued the case from February 18th until March 18th, is invalid because none of the reasons for continuance are checked on the form.

However, on this entry, while the defense attorney did not mark the line indicating the defendant's

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[55] *State v. Brown*, 64 Ohio St.3d 476, 479, 597 N.E.2d 97; *State v. McDonald* (1976), 48 Ohio St.2d 66, 357 N.E.2d 40, paragraph one of the syllabus.

[56] R.C. 2945.72(H).

counsel requests a continuance, the "reason" section of this option is completed, wherein the defense counsel indicated the reason for its requested continuance was "Discovery." This section is followed by the signature of the defendant's counsel, indicating that the continuance is being requested by the defendant. Furthermore, at the bottom of the entry, the option that the time for the defendant to be brought to trial "IS" extended for the period of the continuance is circled and a notation was made that the time was extended "from 2-18-05." These notations and the signature indicate that this continuance was made at the request of the defendant's counsel and was intended to toll the speedy trial time. Therefore, the court finds this entry of continuance granted at the defendant's request to be effective to extend the speedy trial time limits by the period of the continuance.[57]

The defense also argues that the time covered by the February and March waivers is chargeable to the state because the defendant was waiting for discovery materials from the prosecutor. In considering this argument, a large part of the continuance in this case is because the defendant has had a succession of four different attorneys representing him. Tim Schneider was representing the defendant, and the record reflects that discovery was provided the defendant during the time of his representation. Schneider was replaced by Kenneth Lawson, who promptly made his own discovery request on February 11, 2005. He then requested continuances until April 8, 2005 for the

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[57] Id.

state to provide this discovery. The period of time involved is fifty-six days.

It is well-established that when a defendant files a demand for discovery or a bill of particulars, the time between the filing of the demand and the state providing discovery must be counted against the defendant.[58] The time in which a defendant must receive a speedy trial pursuant to R.C. 2945.71(C) is tolled under R.C. 2945.72(E) until the state responds in a reasonably timely fashion.[59]

While the defendant, through defense counsel, agreed to the continuances until April 8, 2005, the court also finds that the fifty-six days which elapsed for the prosecution to respond to the discovery request was reasonable particularly given the complexity of this case. Therefore, the time between February 11th and April 8th is properly chargeable to the defendant.

On April 8, 2005, the Pre-Trial Conference was held. The time between April 8, 2005 and May 10, 2005, when a second pretrial conference was scheduled, is chargeable to the state.

However, once again, the defendant was serving a prison sentence in another case, and he is not entitled to a triple count for the thirty two days which elapsed

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[58] *State v. Scott*, (Dec. 14, 2001), 2nd Dist. No. 2001CA8; *State v. Keith* (12th Dist., 1998), 130 Ohio App.3d 456, 459, 720 N.E.2d 216; *State v. Benge*, (April 24, 2000), 12th Dist. No. CA99-05-095; *State v. Brown* (Aug. 6, 2001), 12th Dist. No. CA2000-10-027.

[59] *Brown*, citing *Benge*.

during this time period. This brings the total time chargeable to the state to forty days.

Then defendant's newly retained counsel requested and was granted an entry of continuance from May 10, 1005 until May 26, 2005. This time is not chargeable to the state.[60]

On May 26, 2005, another Pre-Trial Conference was held. On that date, the defendant's new counsel Scott Rubenstein filed a Waiver of Time Provisions. This waiver states that the "undersigned Defendant or Designated Attorney for the Defendant in the above captioned case, waives the Defendant's right to be brought to trial as prescribed in Section 2945.71 of the Ohio Revised Code for the following reason: Defense needs time for further case preparation."

The right to a speedy trial is subject to a knowing and voluntary waiver by the defendant,[61] or to waiver by the defendant's counsel "for reasons of trial preparation and the defendant is bound by the waiver even though the waiver is executed without his consent."[62] The waiver signed by the defendant's counsel Rubenstein for the purpose of trial preparation bound the defendant even though it may have been executed without his consent.

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[60] Id.

[61] See *State v. O'Brien* (1987), 34 Ohio St.3d 7, 516 N.E.2d 218, paragraph one of the syllabus.

[62] *State v. McBreen* (1978), 54 Ohio St.2d 315, 376 N.E.2d 593.

A waiver that expressly waives the accused's right to a speedy trial under the statute without mentioning a specific time period is unlimited in duration.[63] The waiver in this case was signed by Rubenstein as the defendant's counsel at the time and was made for an unlimited duration of time.

Speedy-trial waivers are distinct from the provisions in R.C. 2945.72 that extend the statutory speedy-trial time by tolling it.[64] "Once an accused has made an express, written waiver of unlimited duration 'the accused is not entitled to a discharge for delay in bringing him to trial unless the accused files a formal written objection and demand for trial, following which the state must bring the accused to trial within a reasonable time.'"[65] As to the statutory right, a waiver relinquishes the right, at least until the waiver is withdrawn.[66]

As a result, the defendant's statutory trial time limits were waived, which served to relinquish those rights, at least until the time that he withdrew those rights. That did not occur until such time as the

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[63] *State v. Green* (June 13, 2003), 7th Dist. No. 01 CA 54, 2003-Ohio-3074, at ¶12, citing *O'Brien* (1987), at paragraph two of the syllabus.

[64] *State v. Kerby* (2nd Dist., 2005), 162 Ohio App.3d 353, 364, 833 N.E.2d 757, 2005-Ohio-3734, at ¶ 8.

[65] *State v. Kovacek* (May 30, 2001), 9th Dist. No. 00CA007713, quoting *O'Brien*, at paragraph two of the syllabus.

[66] See *Kerby*.

defendant filed his motion to dismiss on speedy trial grounds on July 28, 2006.

However, at that time, the defendant's motion to dismiss served to toll the statutory speedy trial rights until it was ruled on.[67] As a result, the total number of days chargeable to the state through the time that the court has ruled on the motion to dismiss on speedy trial grounds is forty days.

Additionally, it is worth noting that there are various other valid reasons for extending the time under R.C. 2945.72. On June 15, 2005, the defendant's counsel made a motion for a Bill of Particulars. As discussed above, the time between filing such a demand and the State providing the requested material is charged to the defendant.

The defendant was again granted a continuance from June 29, 2005 until August 8, 2005 for a plea. This plea date of August 8, 2005 was then continued per the defendant's request until August 26, 2005. The plea set for August 26, 2005 was then continued at the request of the defendant until September 21, 2005 due to plea negotiations.

On September 21, 2005, the defendant filed his first motion to dismiss in this case and was granted a continuance until October 25, 2005 so the motion to dismiss could be heard. On October 25, 2005, this court

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[67] *State v. Mintz* (6th Dist., 1991), 74 Ohio App.3d 62, 69, 598 N.E.2d 52, citing *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 67,461 N.E.2d 892; see R.C. 2945.72(E).

heard oral arguments on the first motion to dismiss and also reviewed the defendant's bond and ordered it to be reduced. The defendant posted bail on October 27, 2005, and as a result, the defendant would not be entitled to a triple count for the period of time which has elapsed after he was released from prison.

The time spent by a trial court in determining the issues raised in a defendant's motion normally does not count against the time limit for bringing the defendant to trial; so long as the time spent is not excessive and unjustified by the record.[68]

"In determining the reasonableness of the time in which a trial court must rule on a motion, careful examination of the particular circumstances of the case must be made. The complexity of the facts and the difficulty of the legal issues to be resolved must be considered. A reviewing court must also be cognizant of the time constraints placed on a trial judge's schedule ."[69]

The defendant's initial motion to dismiss raises legal issues which are unusual and are difficult related to the application of the Ohio corrupt activities statute. This is not the typical motion to dismiss or suppress. Moreover, it is well-known that the workload for the court is heavy, which is the reason why a fourth judge is being added to the court effective January 1, 2007.

---

[68] *State v. Baker* (May 22, 2006) 12th Dist. No. CA2005-05-017, 2006-Ohio-2516, at ¶ 38, citing *State v. Arrizola* (3rd Dist., 1992), 79 Ohio App.3d 72, 76, 606 N.E.2d 1020.

[69] *Arrizola,* 79 Ohio App.3d at 76, 606 N.E.2d 1020.

Under the particular facts and circumstances of this case, the court finds that a delay in ruling on the motion through April 24, 2006, when defense counsel requested his next continuance, is more than reasonable.

On April 24, 2006, the defendant's current counsel requested and was granted a motion for continuance and waiver of time due to the fact that he had been recently retained. This resulted in the jury trial set for May 1, 2006 being continued until May 30, 2006, with the defendant waiving time until the new trial date.

The defendant filed this motion to dismiss on July 28, 2006, at which point the speedy trial time once again began to toll until the date of this decision. Fifty-nine days elapsed between the expected date of the trial on May 30, 2005 and the date of the filing of this motion.

This brings the total amount of speedy trial time as of the date of this decision to ninety-nine days, which is considerably less than the statutory time limit of two hundred seventy days.

Therefore, based on the above analysis, the court finds that the defendant's right to a speedy trial has not been violated and the second motion to dismiss shall be denied.

In conclusion, both motions to dismiss filed by the defendant are not well-taken and shall be denied.

IT IS SO ORDERED.

DATED: 8-11-06 /s/

Judge Jerry R. McBride

APPENDIX F

THE SUPREME COURT OF OHIO

CASE NO. 2007-2369

[Filed April 9, 2008]

State of Ohio	)
	)
v.	)
	)
Jarrod William Messer	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

(Clermont County Court of Appeals; No. CA200610084)

/s/
THOMAS J. MOYER
Chief Justice

APPENDIX G

IN THE COURT OF APPEALS OF OHIO
FOR CLERMONT COUNTY
TWELFTH APPELLATE DISTRICT

Case No. 2006 CA 10084
(Trial Court Case No. 04-CR-00720)

[Filed October 13, 2006]

STATE OF OHIO,	)
	)
Plaintiff,	)
	)
vs.	)
	)
JARROD MESSER	)
	)
Defendant.	)
	)

NOTICE OF APPEAL

NOW comes the Defendant, Jarrod Messer, and hereby submits and files this NOTICE OF APPEAL from the judgments of the Common Pleas Court of Clermont County, Ohio, Criminal Division, case number 04-CR-00720 (attached hereto) wherein the trial court overruled Defendant's motion to dismiss on August 11 , 2006, the Court made the decision finding Defendant guilty on no contest plea on August 15,

2006, and also sentencing as of September 20, 2006. All parties are to take notice that the Defendant is appealing said adverse judgment.

Respectfully submitted,

/s/_____
John J. Scaccia, reg. #0022217
130 West Second Street
1400 First National Plaza
Dayton, Ohio 45402
Phone: (937) 223-7848
Fax: (937) 223-7845

APPENDIX H

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

CASE NO: 04-CR-00720

[Filed September 22, 2004]

STATE OF OHIO,	)
PLAINTIFF,	)
	)
VS.	)
	)
JARROD WILLIAM MESSER,	)
DOB: 12-22-70	)
[REDACTED]	)
DEFENDANT.	)
	)

INDICTMENT FOR:

ENGAGING IN PATTERN OF CORRUPT ACTIVITY

THE STATE OF OHIO, CLERMONT COUNTY, ss. COURT OF COMMON PLEAS

IN THE SEPTEMBER TERM, 2004, THE JURORS OF THE GRAND JURY IN AND FOR CLERMONT COUNTY, OHIO, ON THEIR OATHS, IN THE NAME AND BY THE AUTHORITY OF

THE STATE OF OHIO, DO FIND AND PRESENT THAT:

JARROD WILLIAM MESSER, on or about the 7th day of June, 2002 through the 23rd day of April, 2003, in a continuing course of criminal conduct occurring, in part, in Clermont County, Ohio, while employed by, or associated with, any enterprise conducted or participated in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt, and at least one of the incidents of corrupt activity was a felony of the first, second, or third degree, aggravated murder, or murder, if at least one of the incidents was a felony under the law of this state that was committed prior to the effective date of this amendment and that would constitute a felony of the first, second, or third degree, aggravated murder, or murder if committed on or after the effective date of this amendment, or if at least one of the incidents of corrupt activity is a felony under the law of the United States or of another state that, if committed in this state on or after the effective date of this amendment, would constitute a felony of the first, second, or third degree, or aggravated murder, or murder under the law of this state. The predicate acts constituting the pattern of corrupt activity of said enterprise include, but are not limited to:

1) On June 7, 2002, in Owensville, Clermont County, Ohio, Defendant did commit the offense of Illegal Manufacture of Drugs–Methamphetamine and Possession of Drugs–Methamphetamine. On February 28, 2003, Messer pled guilty to Illegal Assembly (a felony of the third degree) and Aggravated Possession of Drugs.

2) On June 16, 2002, in Williamsburg, Clermont County, Ohio, the Defendant did commit the offense of Receiving Stolen Property, to wit; firearms sold to him by Brian Knuckles. The indictment for this offense is pending in Common Pleas Court.

3) On July 15, 2002, in Harlan Township, Warren County, Ohio, the Defendant did knowingly possess Methamphetamine and was indicted for Aggravated Possession of Drugs which is pending in Common Pleas Court.

4) On November 24, 2002, in Clinton County, Ohio, Defendant committed the offense of Receiving Stolen Property as he was in the possession of stolen property, to wit; a 1998 GMC pick-up truck, stolen from the Auxier farm at 4560 SR 276, Williamsburg, Clermont County, Ohio. This offense is currently pending charge.

5) On November 25, 2002, in Fayetteville, Brown County, Ohio, the Defendant was in violation of the offense Illegal Assembly or Possession of Chemicals Used in the Manufacture of Drugs and Receiving Stolen Property in that he had in his possession an anhydrous ammonia tank at his property located at 1941 Bauer Road. The anhydrous ammonia tank was stolen from the Auxier farm at 4560 SR 276, Williamsburg, Clermont County, Ohio. During a search executed at the Defendant's residence, additional items used in the manufacture of methamphetamine were also seized. Indictments are currently pending in this case.

6) On January 11, 2003, in Lynchburg, Highland County, Ohio, the Defendant did commit the offense of Felonious Assault (a felony of the first degree) by attempting to run down Deputy Jay Shaw of the Brown County Sheriff's Office with a motor vehicle. When subsequently stopped Defendant was in violation of Illegal Assembly or Possession of Chemical Used for the Manufacture of Drugs and Possession of Cocaine, as he was found to be in possession of items used in the production of Methamphetamine and approximately 7 grams of Cocaine. These indictments are pending disposition.

7) On April 23, 2003, the Defendant was stopped in Lynchburg, Highland County, Ohio by Officer Brandon Wooten. Defendant was in violation of Receiving Stolen Property, as he was operating a 1986 Chevrolet Monte Carlo. The vehicle was stolen from Dennis Smith Inc. at 1350 Ohio Pike, Amelia, Clermont County, Ohio.

Said conduct, to wit; Engaging in a Pattern of Corrupt Activity, constitutes a felony of the first degree, contrary to and in violation of Section 2923.32(A)(1) of the Revised Code of Ohio, a felony of the first degree, and against the peace and dignity of the State of Ohio.

Endorsed: A true bill.

/s/_____
Foreman of the Grand Jury

/s/_____
DONALD W. WHITE, Prosecuting Attorney

/s/ _____
By: Assistant Prosecuting Attorney

NOTICE: No person shall acquire, have, carry, or use any firearm or dangerous ordnance if indicted for any felony of violence or any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse. Sections 2923.13, 2923.14, Ohio Revised Code.

The State of Ohio, Clermont County, ss:

I, David R. Caudill, Jr., Clerk of the Court of Common Pleas, in and for said County do hereby certify that the within and foregoing is a full, true, and correct copy of the original indictment, together with the endorsements thereon, now on file in my office.

Witness my signature and the seal of said Court this ___ day of _____, 2004

David R. Caudill. Jr. _____
Clerk

BY: _____ _____
Deputy

On this ____ day of _____, 2004, the Defendant herein was arraigned and hereby pleads ____ Guilty to this Indictment of one count.

_____
Defendant

Attorney for Defendant

Clerk, Common Pleas Court

APPENDIX I

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

Case No. 2004CR720
COA No. 2006-CA-10-084

[August 3, 2006]

STATE OF OHIO,)
Plaintiff,)
)
vs)
)
JARROD MESSER,)
Defendant,)
)

Motion Hearing

APPEARANCES

On Behalf of the Plaintiff:

DAVID HOFFMANN, ESQ.
Assistant Prosecuting Atty.

On Behalf of the Defendant:

JOHN SCACCIA, ESQ

BE IT REMEMBERED that the above-entitled hearing came on to be heard before the Honorable Jerry R. McBride, on the 3rd day of August, 2006.

THE BAILIFF: State of Ohio versus Jarrod Messer.

MR. SCACCIA: Your Honor, I believe we're going to have a number of stipulations that we're going to enter into.

MR. HOFFMANN: We could -- I was - - excuse me, Your Honor. I believe we could cover that as we go. I think that we could go ahead and set out a statement of facts, one or both of us could, and then we could address. We've already agreed to what the stipulations should be, and we could indicate at the time that we state the fact that it's stipulated to. If we could just proceed that way --

THE COURT: Okay.

MR. HOFFMANN: I think it might be more efficient.

THE COURT: All right.

MR. SCACCIA: All right. Your Honor, how much time do I have for my argument?

THE COURT: Reasonable.

MR. SCACCIA: All right. I just want an opportunity to reply to him.

THE COURT: Okay.

MR. HOFFMANN: That's a good one.

MR. SCACCIA: I'd like initially to have my exhibits marked as 1 and 2, and I believe the State will also be marking an exhibit.

THE COURT: Okay.

MR. SCACCIA: If I may approach the bench?

THE COURT: Sure.

(Defendant's Exhibit 1 and 2 marked for identification.)

MR. SCACCIA: Sorry. I have an extra one for the -- Exhibit 1 is the March statement. The Exhibit 2 would be the graph or time line, Your Honor. And I believe these have both been stipulated to by the Prosecution.

MR. HOFFMANN: That's correct.

MR. SCACCIA: Is that correct?

MR. HOFFMANN: That's correct.

MR. SCACCIA: What Exhibit 1 and 2 show, Your Honor, is the time in which Mr. Messer was incarcerated on various charges, his arrest, his arraignment dates and so on. A particular interest in this matter is going to be the Clermont County case and the Brown County case. But I think as a preface to all that, the Court should recall that this entire case against Mr. Messer, all the predicated acts involve the four convictions that are set forth on Exhibits 1 and 2.

And because all of them are predicated on those acts, under the Homan case and the Adams case, the time for which Mr. Messer should be brought to trial should have included those. Otherwise piecemeal litigation occurs, and there's a whole lot of prejudice that arises from that type of a situation.

And again, also for judicial economy reasons, and also because of issues aside that start with allied offense, and a whole lot of things it is important the cases be brought together at or around the same time, and for the other reasons set forth in the Homan and the Adam cases as to why we prefer to have litigation at around the same time and consolidated as much as possible. What these -- this chart does demonstrate, if we just look at the last conviction, the Brown County case -- and the time lines in the Brown County case would overlap with the Highland County case, which is in green -- but the time -- the time on the Brown County case, if you take it from the date of arraignment to the date of conviction is 236 days.

If you add to that the time of arrest, you are adding an additional 53 days, which would take the time line to 289 days since the time of arrest, and I believe that is the minimum standard. If you add it to the time of indictment -- which he was also incarcerated on -- but if you go from the time of indictment, you have another 28 days bringing us to 317 days. I think we all know that the speedy trial statute requires 280 days to be brought to trial. So, he has overshot that at least in two instances on just the Brown County case.

If you add the other main predicated act case in this case, the Clermont County case, you add another

186 days to that, because you -- there is no overlap. Clermont County, his date of conviction is 2/28/03. The Brown County case the date of arraignment is 3/6/03. So, if you add the 289 days from the date of arraignment to the date of conviction to the 186 days in the Clermont County case, you're up to over 400 days on the speedy trial statute, Your Honor.

And in this particular instance the penalty that the Prosecution pays for, piecemeal litigation, is that any waivers that occur in those other cases do not count toward Mr. Messer's time in the instant case. And that's important. There is one other matter too that I would bring to the Court's attention. One of the predicated acts, in fact all of the predicated acts, Mr. Messer was incarcerated on. But this wasn't just a general incarceration. I'm not looking at the 180 days statute. I'm looking in terms of the speedy trial statute, and in the principles of speedy trial.

When he was indicted on this case the Prosecution was well aware, because they convicted him, that he was also being incarcerated on the Clermont County case. In that instance there on September 30th when he was arraigned, the reflection from the prosecutor's office indicates that we don't know where he is. Well, hold on and read your indictment, and look at the history of the -- what your office did in terms of convicting this man. So, if we were to add on to any of these factors just the time from September 30th to when he was indicted, until the time in which he was ultimately arraigned in this case, you're looking at an additional -- it's September, October, November -- you're looking at 61, 67, 77 more days added to -- added to any of these figures. Because in that instance

there the Prosecution knew where he was. They convicted him, and yet they didn't bring him to trial.

Now, there will be some additional stipulations that go on that may mitigate some of that time, but I believe that time is not going to be sufficiently mitigated to take away any of the clock issues that we're talking about here. Furthermore, I would also bring to the Court's attention although there were a number of continuances that I don't disagree were chargeable against the Defendant there were other continuances in the course of the record here that would indicate were not chargeable to the record.

I'm going to let the Prosecution address that, and then I'll respond. But I think that the main core or the main crux of my -- my argument is that by the time that he was basically indicted, his speedy trial time ran because all the predicated acts upon which he was chargeable had already occurred. There was no -- Mr. Messer did nothing additionally wrong, and there's been no evidence presented in the Court's repeated entries about -- from this case indicating the Prosecutor's representations have been repeatedly -- with regard to the discovery issues -- that the all predicated acts occurred on these four convictions. So, with that in mind just the -- the issues relating to the prior convictions merging into the instant case, we have more than enough speedy trial time which would have elapsed before he was even charged. Thank you, Your Honor.

THE COURT: Mr. Hawkins?

MR. HOFFMANN: Thank you, Your Honor. If it please the Court and counsel? The crux of the motion to dismiss is -- is an analogy between the facts of this case and those of Homan and Adams. And it's our position that the facts are not analogous. The Homan case deals with succeeding indictments based upon a single fact pattern. And you had a DUI charge from a traffic stop. And then an indictment based upon that. And then down the road you have a new charge of endangering children based upon the fact that the Defendant in the Homan case had a -- if I remember the facts correctly -- a child in the car at the time. And the speedy trial elapsed time that related to the original indictment was applied to the new charge. Under Adams and Homan that's the rule.

In this case, you have a fact scenario that the indictment is based upon. You have a single indictment. You don't have succeeding indictment. You have a single indictment. In this case it's for a pattern of -- Engaging in a Pattern of Corrupt Activity Under 2323.32(A)(1). You don't have succeeding indictments. It's one indictment, but the indictment is based upon predicate acts. And the argument goes that the date of those predicate acts should be the beginning point of the speedy trial analysis. And that's where you're comparing apples and oranges, is by trying to analogize Adams and Homan to this situation. The speedy trial statute begins at the date of arrest. The date of arrest in this case was -- was in December when the -- December of 2004 when the Defendant was arrested on this indictment for Engaging in a Pattern of Corrupt Activity.

And he's not being -- he is being prosecuted for those predicate acts, but in the context of the corrupt activity charge, and not in the context of those predicate acts. He's not being reprosecuted for those individual predicate acts. They are the basis of the new indictment, and for that reason, the State's position is that Homan and Adams should not apply to this case. Now, and that's set forth in a memorandum I'd like to file after the hearing. It hasn't been filed before the hearing because we weren't really sure about what facts we would be able to agree to or prove at the hearing. I'd like to -- I know the Court is busy, but I'd just like to go through the constitutional and statutory speedy trial analysis briefly to show that the case is not in violation of the right to speedy trial, presupposing that Adams and Homan do not apply.

The indictment was -- in this case was returned on September 22nd, and -- well, first I'd like to start with the constitutional speedy trial claim. There's a four-part test here under Barker v. Wingo that I'm sure that the Court is familiar with. And I would just like to say that as early as September 30th -- sometime between the September 22d and September 30th of 2004, Clermont County authorities had entered the facts of Mr. Messer's indictment in the NCIC computer. It's the database. It's the National -- well, anyway it's the NCIC computer. It's the National Crime Information Center computer.

And at that time the database did not indicate that Messer was incarcerated. He was in fact incarcerated and imprisoned, had been since 2003 based upon the predicate acts -- the predicate convictions in this case. And it wasn't until November of 2004 that through the

Defendant's own counsel that his -- the fact of his incarceration was brought to the attention of the Clermont County authorities. Now, they make the point the point that in -- from the indictment itself you should have figured out from his prior convictions that he probably would be incarcerated, but that apparently wasn't brought to the attention of the Clermont County authorities who were -- whose job it was to serve the indictment.

But at any rate, in November it was brought to our attention that he was incarcerated. And then the -- in December he was arrested. In December -- that he was arrested on December 15th. And then he didn't raise the speedy trial until several days ago, July 28, 2006. He had repeatedly waived his right to a speedy trial prior to that. And also I -- from his pleadings, and also from hearing his statements I cannot detect any specific prejudice being alleged from the delay.

As to the statutory speedy trial claim, it should be noted that he has 270 days in which to be tried from the date of his arrest. He was incarcerated at the time of his arrest, which was December 15, 2004. And so you have the triple-count provision applying in Division E of 2945.71. You don't count the first day of his arrest anyway though. And so on December 16th, the following day, he waived his right to a speedy trial and continued his court date to December 30th. And there so you don't have any elapsed time yet.

On the 18th of February, 2005, 50 days later and 150 days of speed -- elapsed speedy trial time the pretrial was continued by entries to April 8, 2005, and again time being waived. On May 10th 2005, 32 days

later and 246 days of accumulative elapsed speedy trial time the pretrial was continued to May 26th, and again time was waived. And then a blanket waiver was signed on that day and filed. And that this blanket waiver wasn't limited to a period of any continuance in particular. And then on June 15, 2005, counsel filed a motion for a bill of particulars. On June 29, 2006 -- 2005, the pretrial that day was continued to August 8th, and speedy trial time was waived for the period of that continuance.

And then the August 8, 2005 court date was again continued by the Defense. The entry granting the continuance reset the hearing to August 26, 2005. And the entry noted that the Defendant waived his speedy trial time. The pretrial was then again continued to September 21, 2005, and again the speedy trial time was waived. And then a motion to dismiss on the basis of double jeopardy was filed also on that date, September 21, and that motion continues to be pending according to the Court's docket. And the filing of that motion to dismiss would toll the running of the speedy trial time.

On October 25, 2005, the motion was taken under submission, and the Defendant's bond was reduced. He was discharged on bond on October 27, 2005. And then new counsel moved to continue the May 21, 2006 trial date that had been set, and speedy trial time was waived. On April 27, 2006, counsel moved to withdraw from the case. The trial date was reset to May 30th, and counsel waived a speedy trial deadline. The motion to dismiss on speedy trial grounds was filed July 28th.

The way I calculate it, only 247 days of speedy trial time had elapsed. And then on that basis the statutory speedy trial claim is also without -- without merit. Again, the case turns on the application of Homan and Adams. And based upon what I've already suggested to the Court, those cases should not apply. The Court should look to the date of indictment in this case as to the constitutional speedy trial claim, and the date of arrest as to the statutory speedy trial claim. In both cases, the Defendant's right to a speedy trial has not been violated. I have a couple of exhibits I would like to offer to the Court if the bailiff could mark them for me, A and B -- State's A and B. That would -- this one is A, and that one is B.

(State's Exhibits A and B marked for identification.)

MR. HOFFMANN: The State's Exhibit A, which has been stipulated to, is a time line of the Defendant's incarceration at the Montgomery Education Prerelease Center, where he had been incarcerated during the time that the indictment in this case was pending prior to his arrest. State's Exhibit B is a copy of the warrant shuck of the indictment in this case, and it indicates that the -- that the indictment and the warrant on the indictment had been entered into the NCIC computer. There's an entry of record in this case indicating that it was done as late as September 30th, and the indictment was returned on September 22nd. And it was received. There's a date of September 23rd on the warrant shuck when it was processed by the Sheriff's office. Other than that, the other exhibits relied upon in my response to the motion are entries of record in this case. I could put exhibit markers on

them, or I could refer to them in my memo. I think I'll do the later. But if there's no objection from counsel, I'll just enter these and--

THE COURT: Okay.

MR. HOFFMANN: -- and submit these to the Court. I have extra copies for counsel.

MR. SCACCIA: Do you have extra copies for me, or can I get a copy?

MR. HOFFMANN: I do. I have extra copies.

MR. SCACCIA: Okay. Thank you.

MR. HOFFMANN: With that, Judge, I'm prepared to submit the -- the issue to the Court.

MR. SCACCIA: If I may, Your Honor?

THE COURT: Sure.

MR. SCACCIA: Just a couple brief responses here, and I think Exhibit A also shows that one of the predicated -- that he was incarcerated on one of the predicated acts in this case, the Clermont County case at the time the indictment went down on the instant case here. So, folks knew where he was, or Prosecution certainly knew where he was. I would also point out to the Court that this whole effort to distinguish Adams and Homan on the basis of the succeeding indictment versus predicated acts is just a -- a word game. The predicated acts were the -- the succeeding indictment in this instance was the series of events that occurred

for which he was indicted for previously. And the time at which to bring any indictment certainly shouldn't have been in September of 2004 at that juncture.

He had been long been convicted about everything that was in the basis of the charges. And in fact, all of his convictions he was incarcerated for in one charge or another. So, I mean, at the time of his earlier case until the time of his conviction in the latest case he wasn't out doing additional acts. This was a crime spree, drug related to some problems that Messer -- Mr. Messer was experiencing that predated any of the indictments in this particular matter, and they all occurred then. There are two matters though that I wish to bring to the Court's attention. Either under the stipulation that we had agreed to with regards to the November. In November his counsel contacted the State and said, "Hold on. My guy is in jail. You need to bring him forth." If we look at the presumption from November 1st, and that he did that, and I think in this instance here all the presumption weigh in favor of Mr. Messer until the time of his arraignment in this instance even if we don't count any three-day period.

You're still looking at a total of at least 45 days to be added on top of everything else, or however the Court wants to cut it. I would submit though that before that the speedy trial time had elapsed, but regardless if there were a couple of days hanging there's another 45 days. There's also at least one entry that I'm concerned about -- actually two in the Court's record. The February 23, 2005 entry for continuance filed, none of the boxes are checked, but it indicates that time has extended so that the Defendant can obtain a discovery.

Well, the discovery should have been provided by the Prosecutor. And similarly on March 21, 2005 a continuance is granted so -- so that -- the reason is the discovery provided there. The problem I have with continuing trial at the Defendant's expense for discovery issues is it encourages the Prosecution not to provide what they are statutorily and constitutionally required to provide to the Defendant, and in that instance there it encourages the Prosecution to use withholding discovery as a means to delay trial and violate his speedy trial rights. So, I think in those instances there the time certainly shouldn't have cut against the Defendant. And in the first instance from the 23rd entry to the 18th -- which is when the hearing was held with regards to the March 21st entry -- you're looking at 22 days. If you go from the 18th or even the 21st to April 8th, you're looking at somewhere in the neighborhood of 18 to 21 days depending on how the Court is cutting it. So, there's another 43 days on top of 45 days to the period of time of his indictment to his -- to his arraignment or the period of time in which the notification of his counsel occurred to arraignment 45 days or 77 days, according to how -- how it's being counted.

So, if you look at the totality of the times involved here generally, yeah, the Homan and Adams case I think extinguishes this case even prior to the time it was indicted. But if for some reason there's some days lingering -- if we count one indictment and don't count certain other rights -- there's still enough speedy trial issues here in the narrow time frame between the time of indictment and the time of arraignment, or between the time of arraignment -- or notification in November -- we'll say November 1st to December 16th and/or the

time lines that I just even indicated there that would consume this speedy trial statute. So, I -- my sense in this matter is, Your Honor, in looking at the law is that succeeding indictments for the predicate -- where the predicated acts in this particular instance is basically distinction without difference, and that the fundamentally Mr. Messer's speedy trial rights have been violated. He is under no duty to alert the prosecution or the Court that his speedy trials had elapsed.

I came on this case late, granted, but any prior counsel did not have a duty that to withhold that -- or reserve their filing. So, that does not -- and the case law is very clear on that -- that does not interfere at all with Mr. Messer's rights in this matter. Thank you.

THE COURT: You're going to submit a memorandum; is that what I'm going to understand, Mr. Hoffmann?

MR. HOFFMANN: That's correct, Your Honor. I've got it right here. I'll just clean it up and file it with the Court today.

THE COURT: Okay.

MR. HOFFMANN: I'll serve of a copy to -- on opposing counsel.

MR. SCACCIA: Okay.

MR. HOFFMANN: Also I could -- I'll need to make copies of the two exhibits I submitted to.

MR. SCACCIA: Okay.

MR. HOFFMANN: If the Court would allow me to do that?

MR. SCACCIA: If I need to have a few days then to respond to that if necessary, Your Honor.

THE COURT: That's fine. I'm going to rule on this very quickly.

MR. SCACCIA: I understand.

THE COURT: Okay. Thank you. Okay.

THE BAILIFF: All rise. The Court is in recess.

(Hearing concluded.)

CERTIFICATE

STATE OF OHIO :
: SS
COUNTY OF CLERMONT :

I, Kathy S. Simpson, official court reporter for Court of Common Pleas, Clermont County, Ohio, do hereby certify that the foregoing transcript was duly taken by digital audio equipment and thereafter transcribed into typewriting by computer under my supervision, and that the same is true and correct in all respects as transcribed from said equipment.

I further certify that I am not counsel, attorney, relative or employee of any of the parties hereto, or in any way interested in the within action.

IN WITNESS WHEREOF, I have hereunto set my hand and Notarial seal on this 15th day of January 2007.

My commission expires
February 20, 2007

*/s/*_____
Kathy R. Simpson, RPR
Notary Public – State of Ohio

APPENDIX J

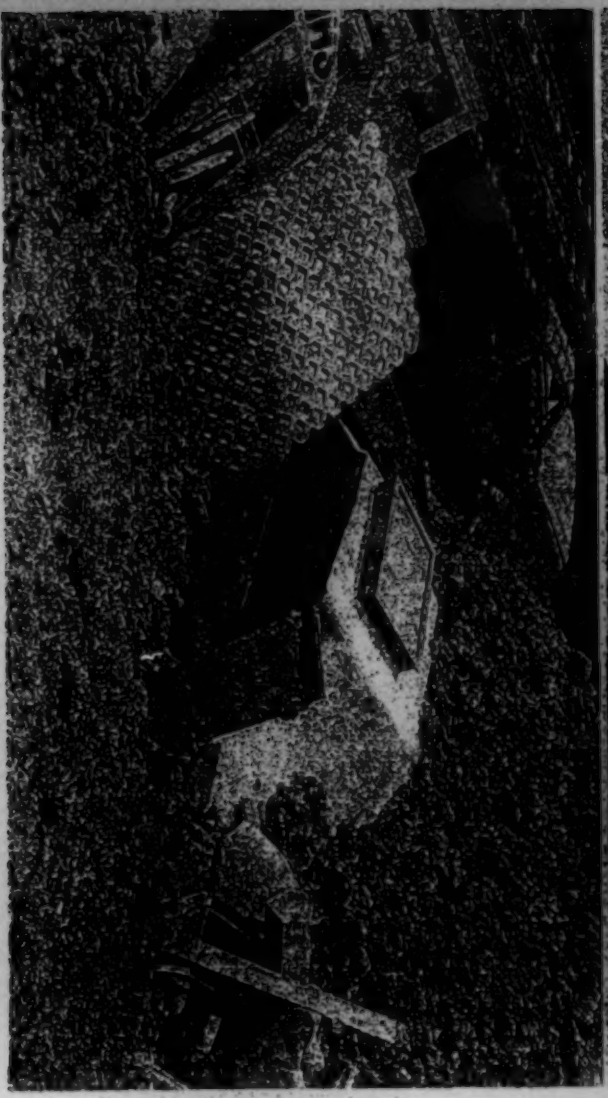
[see foldout pages]

PLAINTIFF'S DEPOSITION EXHIBIT

6

BEST AVAILABLE COPY

PLAINTIFF'S DEPOSITION EXHIBIT 8



PLAINTIFF'S DEPOSITION EXHIBIT

11

Supreme Court, U.S.
FILED
OCT 23 2008
OFFICE OF THE CLERK

No. 08-237

In The
Supreme Court of the United States

JARROD WILLIAM MESSER,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Clermont County

BRIEF IN OPPOSITION

DAVID H. HOFFMANN
Counsel of Record
ASSISTANT PROSECUTOR FOR
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OMISSIONS PURSUANT TO RULE 24(4)

Respondent is satisfied with Petitioner's Questions Presented, Opinions Below, Jurisdictional Statement, and Constitutional and Statutory Provisions Involved, et al., and, under Rule 24(2), exercises its option to omit same. Pursuant to Rule 15(3), Respondent further opts to omit a Summary of Argument.

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BRIEF FOR RESPONDENT, THE STATE OF OHIO, IN OPPOSITION

Respondent, the State of Ohio, prays that Petitioner's Petition for Writ of Certiorari to review the judgment and opinion of Ohio's Twelfth District Court of Appeals be denied. The opinion affirming Petitioner's sentence was entered November 5, 2007, in *State v. Messer*, No. CA2006-10-084 (Ohio 12th Dist., Nov. 5, 2007).

STATEMENT OF THE CASE

On September 22, 2004, the Clermont County Grand Jury indicted Petitioner Jarrod Messer under Ohio's RICO statute, Ohio Rev. Code Ann. § 2923.32(A)(1). The dates of the predicate offenses range from June 2002 to April 2003.

On September 30, 2004, while the warrant on indictment was outstanding, the case was called for arraignment. In an entry filed on that date, the matter was continued pending service of the indictment, the entry indicating that the warrant had been entered in the National Crime Information Center ("NCIC"), a computer data bank.

The pending indictment was entered into the NCIC databank sometime between September 22 and September 30, 2004. In November 2004, Clermont County Officials were notified by counsel of Messer's incarceration.

Messer was arrested on the warrant on indictment December 15, 2004. He remained incarcerated, but

not solely on that charge. On December 16, 2004, the following day, Messer, pro se, waived his right to a speedy trial and continued his court date to December 30, 2004. Beginning January 7, 2005, eight days later, the case was continued by entries to April 8, 2005, speedy-trial time being waived. On May 10, 2005, 32 days later, and with 40 days of cumulative elapsed speedy-trial time, the pretrial was continued to May 26, 2005, and a "blanket" time waiver was filed. This waiver was not withdrawn prior to the filing of the motion to dismiss on speedy-trial grounds on July 28, 2006.

On August 3, 2006, the motion to dismiss was heard and taken under advisement. On August 11, 2006, a combination decision - judgment entry was filed denying the motion. The same day, Messer entered a plea of no contest to the amended charge of attempted engaging in a pattern of corrupt activity under Ohio Rev. Code Ann. §§ 2923.02(A) and 2923.32(A)(1). On September 28, 2006, the trial court sentenced Messer to serve five years of community control. The Court of Appeals for Clermont County affirmed, holding that the speedy trial deadline should be calculated using the date of arrest for the RICO charge, not the date of arrest for the latest predicate offense. *State v. Messer*, No. CA2006-10-084 (Ohio 12th Dist., Nov. 5, 2007) The Supreme Court of Ohio declined jurisdiction. *State v. Messer*, 117 Ohio St.3d 1458, (2008). A petition for certiorari was timely filed in this Court, after an extension, on August 21, 2008.

ARGUMENT AGAINST GRANTING CERTIORARI

Certiorari should not be granted, because Sixth Amendment speedy trial rights are not recognized to apply to pre-indictment delay.

I. Introduction

Petitioner Jarrod Messer claimed only that his speedy trial right listed in the Sixth Amendment, and protected in Ohio Rev. Code Ann. §§ 2945.71 et seq., which were intended to codify that right, was violated by the pre-indictment delay in this case. He now adds, too late, a due process claim based upon the Fifth Amendment.

Pre-indictment is the proper term, because Messer is attempting to include the time prior to the filing of the instant RICO indictment in a Sixth Amendment analysis. He seeks to have the speedy-trial time run from the time of the indictments or convictions involved in the predicate offenses. Again, this claim is leveled against the RICO indictment in terms of the Speedy Trial Clause of the Sixth Amendment, not the Due Process clause in the Fifth Amendment, which protects against pre accusation delay.

II. The speedy trial right listed in the Sixth Amendment does not protect against pre-indictment delay.

The Speedy Trial Clause of the Sixth Amendment, which lists certain rights of the "accused," protects against post-accusation delay. *United States v.*

Valenzuela-Bernal, 458 U.S. 858, 868, (1982). Ohio has codified that right by enacting the speedy trial statutes in Ohio Rev. Code Ann. §§ 2945.71 et seq. *State v. Parker*, 113 Ohio St.3d 207, 209, (2007). The Due Process Clause of the Fifth Amendment, on the other hand, lists the right of a "person" to due process, and therefore has been interpreted to include the right against pre-accusation, or pre-indictment delay. *United States v. Macdonald*, 456 U.S. 1, 7, (1982). This right has been codified in Ohio by the enactment of the statute of limitations in Ohio Rev. Code Ann. § 2901.13. See *United States v. Marion*, 404 U.S. 307, 322-23, (1971).

By choosing to plead the Sixth Amendment Right below, Messer should be considered to have waived his right to raise a Fifth Amendment Claim before this Court.

Further, the Sixth Amendment Claim was properly disposed of by the trial court and the court of appeals. Messer sought to apply a line of Sixth Amendment cases to his pre-indictment delay in this case. The cases; *State v. Adams*, 43 Ohio St.3d 67, (1989) and *State v. Homan*, 89 Ohio St.3d 21, (2000), both require that the trial deadline in related, but sequential, prosecutions be based upon the file date of the earliest prosecution. Here, however, the prosecutions of the predicate offenses are more akin to the materialization of the elements of the offense, not the first of several related sequential prosecutions. The cases are not apposite. The petition for certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondent submits that the Petitioner has failed to raise an issue deserving of review by this Court. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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